No. 3956

1336 United States 1336

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES E. WARREN and MABEL D. WARREN,

Plaintiffs in Error,

vs.

F. GENN BROMLEY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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EDWIN A. WILCOX, Esq., and Messrs. FRY & JENKINS, San Jose, California,
Attorneys for Plaintiffs in Error.

ARTHUR H. BARENDT, Esq., Mills Building, San Francisco, Calif.,
Attorneys for Defendant in Error.

The District Court of the United States, for the Southern Division of the Northern District of California.

(No. 16,576.)

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN.

Defendants.

Complaint.

DAMAGES—BREACH OF CONTRACT—CONVERSION.

Comes now F. Genn Bromley, the plaintiff herein, and for his cause of action alleges:

I.

That he is a citizen of the British Empire and a subject of the King of England; that the defendants

are and each of them is, a citizen of the State of California, residing at Cupertino, in the County of Santa Clara in said state, and they are inhabitants of the Southern Division of the Northern District of California.

II.

That on the first day of December, 1919, plaintiff and defendants entered into an agreement of purchase and sale of certain acreage devoted mainly to the raising of fruit, located on the Homestead Road, near Cupertino, in the county of Santa Clara, State of California, and certain personal property situated on the said acreage property; that attached to this complaint and made a part of hereof is a full, true and correct copy of said contract, containing a description of said acreage property by metes and bounds, and an itemized statement of all said personal property.

Said contract so attached hereto is marked Exhibit "A" and made a part hereof, and plaintiff pleads said contract in all [1*] terms and conditions as though it were here set forth *in haec verba.*

That under the terms of said contract plaintiff was obligated at the time of the execution thereof to pay, and he did pay, to defendants the sum of Six Thousand ($6,000) Dollars, lawful money of the United States, as a first payment on account of the purchase price of said property in said contract described; that the balance of the purchase price, to wit, the sum of $45,000, was by the terms of said

*Page-number appearing at foot of page of original certified Transcript of Record.

contract to be paid as in said contract provided, on or before five years from the said 1st day of December, 1919, with interest at the rate of six (6%) per cent per annum, payable annually; that payment of said interest and of the balance of the principal payable under said contract, it was expressly provided in said contract should be made by the defendants retaining title to sixty (60%) per cent of the crop grown on the orchard each year during the life of the contract, and that as said crop was disposed of annually the defendants should receive sixty per cent of the proceeds of said crop, which proceeds as stated in said contract, were to be credited by them to unpaid interest and the balance of the principal due them from plaintiff under said contract.

That it is also provided that plaintiff should farm the premises subject matter of the said contract or purchase and sale, in a first class farmer-like and orchardist-like manner; prune the trees, remove as far as possible all borers from the roots of trees, remove dead trees and replant the same with apricot or prune trees and irrigate the orchard each year when water was available and eradicate all rodents and pests and perform such other duties as are set forth in said contract as to the nature of which reference is hereby made to said Exhibit "A."

III.

That plaintiff entered into the immediate possession and occupation of said acreage property and the whole thereof, and commenced and continued thereafter during the entire year of 1920, to farm

said land in a first-class farmer-like and orchardist-like [2] manner; that plaintiff found said orchard in a much rundown and neglected condition; and it was necessary to expend large sums of money in its rehabilitation and plaintiff has expended a sum exceeding $3,825.00 in the rehabilitation of said orchard in so much that the value of said property has been greatly enhanced; and plaintiff invested the sum of $4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in the cultivation of, said orchard.

That the year 1920 was one of exceptional drouth and was the fourth successive dry year in the said county of Santa Clara, and there was neither rainfall nor water available for the adequate irrigation of said ranch, nevertheless plaintiff irrigated said acreage to the utmost capacity of the water actually available and by reason of the care in cultivating and the labor bestowed upon the land and trees on said property, plaintiff succeeded in raising crops the equal of any produced on any similarly situated land devoted to the cultivation of like fruits; and plaintiff has thereby increased the value of said acreage during his tenure thereof.

That in accordance with the terms and conditions of said contract, plaintiff, with the knowledge and consent of defendants, sold all the grapes raised upon said land at a price agreeable to said defendants, and on receipt of the sale price thereof, to wit, on or about the 5th day of November, 1920, paid to

them the sum of $310.10, being sixty (60%) per cent of the said sale price of all of said crop of grapes.

That plaintiff, with the knowledge and consent of defendants, delivered to the California Prune & Apricot Growers Inc., a total of 32,422 pounds of prunes, said delivery being paid for in instalments, to wit, on the 27th day of September, 1920, and the 13th day of November, 1920, and at the express request and order of plaintiff, defendants were credited by said California Prune & Apricot Growers [3] Inc., with sixty (60%) per cent of the said crop of prunes, and said incorporation last mentioned was instructed to pay and paid, on the said last-mentioned dates to defendants sixty (60%) per cent of the first payment made by it for said prunes under said delivery, and defendants have received to be by them applied to the payment of the principal and the unpaid interest under their said contract with plaintiff, the sum of $1,567.18 in addition to the said $313.10 hereinbefore mentioned; that plaintiff is informed and believes and therefore alleges that the balance thereof to be paid to and received by defendants from California Prune & Apricot Growers Inc., and to be by defendants applied to the payment of principal and unpaid interest will be the sum of $1,000.

That with the knowledge and consent of defendants plaintiff delivered to the California Co-operative Canneries from the crops raised by him on said fruit ranch and at various times during the late summer and early fall of the year 1920, 5,545 pounds of pears, 816 pounds of free peaches; 170 pounds of

cling peaches and 23,158 pounds of apricots, and immediately and in person notified said California Co-operative Canneries that sixty (60%) per cent of all of said fruit and the proceeds of sale thereof belonged to and should be credited to defendants, and such credit was immediately thereupon given by said canneries to said defendants; that the value of all of said fruit was and is not less than the sum of $5,000, and the said sixty per cent credit thereof to be applied by defendants to the balance of said principal and unpaid interest under said contract is the sum of $3,000.

That all of said payments on account of said principal and unpaid interest so made by plaintiff to defendants as provided for and agreed upon in said contract, were accepted by them.

That it was provided and agreed by the terms of said contract that payment of the unpaid interest should be made by defendants by crediting the plaintiff on account of the unpaid [4] interest, the said sixty per cent of said crops, and by applynig the proceeds of said sixty per cent of said crops when disposed of, by defendants to the said unpaid interest and said balance of said unpaid purchase price, and by adding to the said principal any unpaid interest at the time of the sale and disposal of said sixty per cent of said crops, and that said unpaid interest should also bear interest at the rate of six per cent per annum in the same manner as the unpaid balance of said principal.

IV.

That plaintiff on or about September 30th, 1920,

placed said ranch property in the temporary care of a competent foreman and went to San Francisco; that during his said absence and on about the 1st day of December, 1920, the defendants, wrongfully and unlawfully and without the knowledge or consent of the plaintiff, entered upon, seized and occupied and appropriated to their own use all of the said land and premises and all the personal property described in said contract, together with all the said property placed thereon by plaintiff, and claimed that plaintiff had broken his said contract and that they were entitled to take over and resume possession of said real property and all the personalty on said ranch, and claimed that plaintiff had forfeited all right, title and interest in and to said real and personal property and the whole thereof, including the said sum of $6,000, paid in cash by plaintiff to defendants on December 1st, 1919, as hereinbefore set forth, together with all moneys received by defendants from the sale of said fruit crops and all of the said balance of said 60% of said crops then unsold, and defendants ever since have held and possessed and do now retain and hold and possess without any legal or other right all of said property and have excluded and now do exclude plaintiff therefrom, and have violated and broken their contract with plaintiff.

That plaintiff has duly and fully performed all the terms and conditions of said contract on his part to be performed. [5]

That by the said acts and conduct of defendants and by their said breach of their said contract

with plaintiff, defendants have caused great loss and damage to plaintiff and plaintiff alleges that he has been damaged thereby in the sum of exceeding $12,025, which said damages suffered thereby by plaintiff are, the said sum of $6,000, paid to defendants under said contract on December 1st, 1919; the sum of $3,525 paid, laid out and expended by plaintiff for help in the farming of said property and for the value of his own labor thereon and $2,500 which plaintiff alleges to be the enhanced value of said property resulting from the labor and care bestowed thereon by plaintiff.

V.

That defendants have not paid to plaintiff any part of the said sum of $12,025, or of the said sum of $6,000, or of the said sum of $3,525, or of the said sum of $2,500.

And as a further, separate and distinct cause of action, plaintiff complains of defendants and alleges:

I.

Plaintiff here repeats and pleads as fully as though here set forth and hereby alleges all the allegations set forth in the several paragraphs of the first cause of action herein, and further alleges:

II.

That defendants, on or about December 1st, 1920, wrongfully and unlawfully took and have since held possession of and converted to their own use and have deprived plaintiff of the rightful

possession of the following described personal property of the value set opposite each item of personal property, viz:

One tractor	of the value of.....	$1,575.00
One bean sprayer	of the value of.....	530.00
Hay for feed	of the value of.....	179.63
Lumber	of the value of.....	56.75

[6]

One cultivator	of the value of.....	150.00
One disc	of the value of.....	190.00
300 fruit trays	of the value of.....	300.00
150 large boxes	of the value of.....	100.00
Chickens	of the value of.....	100.00
Cook-stove	of the value of.....	20.00
Carpet	of the value of.....	150.00
Riding-horse	of the value of.....	100.00
Grass rug	of the value of.....	27.00
Ice-chest	of the value of.....	30.00
Window-screens	of the value of.....	10.00
Brass Curtain Rods	of the value of.....	15.00
Linoleum	of the value of.....	38.00
Trunk and other personal effects	of the value of.....	200.00

That plaintiff, at the time of said wrongful conversion, was the owner and entitled to the exclusive possession of all of said personal property, and the aggregate value thereof was and is the sum of $3,771.38 or thereabouts.

III.

That demand has been made upon defendants for the return of said personal property, but said

property has not, nor has any portion thereof, been returned to plaintiff,

WHEREFORE, plaintiff prays judgment against defendants:

(a) For the sum of $6,000, money paid on account of the purchase price of the property in this complaint described.

(b) For the sum of $6,025, for moneys laid out and expended in the cultivation of said ranch and for tools, implements and machinery; and the enhancement in value of said ranch due to the care and labor bestowed thereon by plaintiff.

(c) For such further sum as the Court may find plaintiff is entitled to recover for breach of contract by defendants.

(d) For the said value of all the said property wrongfully converted to their own use by defendants, in the sum of $3,771.38.

(e) For costs of suit.

(f) For such other and further relief as may be meet in the premises.

ARTHUR H. BARENDT,
Attorney for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

Arthur H. Barendt, being first duly sworn, deposes and says:

That he is the attorney for F. Genn Bromley, the plaintiff in the foregoing action; that he has read and is familiar with the complaint and knows of his own knowledge that the same is true except as to matters therein stated on his information and

belief and as to them he believes it to be true; that he makes this verification for and in behalf of the plaintiff for the reason that the plaintiff is absent from the Southern Division of the Northern District of California and from the City and County of San Francisco, where his attorney resides.

ARTHUR H. BARENDT.

Subscribed and sworn to before me, this 27th day of June, 1921.

[Seal] EUGENE LEVY,

Notary Public in and for the City and County of San Francisco, State of California. [8]

Exhibit "A."

THIS AGREEMENT, made and entered into this first day of December, A. D. 1919, by and between Chas. E. Warren and Mabel D. Warren, his wife, the parties of the first part and F. Genn Bromley, the party of the second part;

WITNESSETH: That the said parties of the first part hereby agree to sell to the said party of the second part, and the said party of the second part agrees to buy and pay for on the terms and conditions and subject to the reservations herein provided all of the following described property, situate, lying and being in the county of Santa Clara, State of California, and particularly described as follows, to wit:

Beginning at a point on the south line of the Homestead Road, formerly known as Emerson or Young Road, which point is west 5 rods from the

section line between sections 10 and 11, Township Seven (7) South, Range 2 West, and is the Northwest corner of the land now or formerly owned by Henrietta Krieg (the late widow of Jacob Smith, deceased) and formerly owned by E. Harrison; thence South along the West line of said lands of Krieg, to the Southwest corner of lands owned by said Krieg; thence at right angles Westerly to the center line of the Cupertino Creek; thence Northerly down said creek following its meanderings and the center line thereof to the South line of the Homestead, Emerson or Young Road; thence Easterly and along said South side of said Road to the place of beginning; containing 55.55 acres of land, more or less, and being parts of lots 5 and 6 and part of the Northeast quarter of the Southeast quarter of Section 10, Township 7 South, Range 2 West, M. D. B. and M. Saving and excepting that portion thereof containing 3.94 acres of land, more or less conveyed by said Pedro M. Lusson to the San Jose-Los Gatos Interurban Railway Company, by deed dated January 16, 1905, and recorded [9] January 27, 1905, in the office of said County Recorder in Volume 289 of Deeds, at page 49, Records of Santa Clara County, California.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, including all water rights.

Also the personal property on said real property, a list of which is hereby attached and made a part hereof.

2. That the full purchase price for said property to be paid by the said party of the second part to the parties of the first part shall be the sum of Fifty-one Thousand ($51,000) Dollars, lawful money of the United States, of which the sum of Six Thousand ($6,000) Dollars is to be paid upon the execution and delivery of this agreement, the receipt whereof is hereby acknowledged.

3. The balance of said purchase price, to wit: the sum of Forty-five Thousand ($45,000) Dollars shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate.

4. It is understood and agreed that the party of the second part will take immediate possession of said premises and during the life of this contract, he shall farm said premises in a first class farmer-like and orchardist-like manner; that he will prune said trees at the proper time each year and so far as is possible remove all borers from the roots of the same; that he will remove all dead trees and as soon as customary thereafter, replant the same with apricot or prune trees. That he will irrigate the orchard each year when the water is available; that he will eradicate all rodents and other pests so far as it is [10] reasonably possible and spray the pear trees each year as often as it is customary so to do.

5. That the party of the second part will pick and gather said fruit when ripe and shall market the same in a first-class manner in accordance with the usual custom of orchardists in Santa Clara Valley.

6. That the parties hereto agreed that the title to sixty (60%) per cent of the crop grown on said orchard each year hereafter during the life of this contract shall remain in the parties of the first part until the same is sold and the proceeds disposed of in the manner provided for in this contract.

7. It is understood and agreed that when said crop is ready for the market, the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in the joint names of the parties of the first part and the party of the second part in the proportion of 60% in the name of the parties of the first part and 40% in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by them credited on unpaid interest and the balance on the principal thereof, as herein agreed.

8. It is understood and agreed that if said fruit is turned into the California Prune and Apricot Growers' Association it shall be received and paid for in the same proportion and for the same purposes as herein agreed.

9. It is understood and agreed that the parties of the first part may any time enter upon said premises and inspect the same and that the said party of the second part will keep all [11] fences, buildings, trays and boxes now on said premises in good repair.

10. The party of the second part agrees to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid.

11. The party of the second part shall keep all buildings which are now on, or which may be hereafter erected on said premises, and the trays and boxes insured against loss or damage by fire, to the amount of at least $5,000.00 in some insurance company or companies to be approved by the said parties of the first part, the policies of which insurance shall be made payable, in case of loss, to the said parties of the first part, and shall be delivered to and held by them; in case said party of the second part fails to insure said buildings or pay the premiums thereon, the parties of the first part may place said insurance and pay the premiums and add the same to the amount of principal hereof and the same shall be immediately due and payable. In case of a fire destroying all or any portion of said buildings, the insurance money shall be used to replace or repair said buildings.

12. It is further agreed by and between the parties hereto that the parties of the first part may mortgage or convey by deed of trust, the said land

in a sum not to exceed $15,000, which said encumbrance shall be a lien prior and paramount to any interest therein of the parties of the second part; provided personal notice is given the party of the second part, and that said encumbrance shall not be for a period exceeding the life of this contract, and the said parties of the first part shall pay the interest and principal thereon when due and shall save the party of the second part from loss or embarrassment by reason of said loan and that should the principal due hereunder be [12] reduced to the amount of said loan, then the next payment made on principal shall be as liquidation of said loan.

13. That upon the payment of said principal sum, together with all interest, taxes and obligations herein mentioned and according to the terms of this contract, said parties of the first part will execute and deliver to the party of the second part a grant, bargain and sale deed, conveying all of said real property, free and clear of all encumbrances, except as herein provided to be paid by the party of the second part.

14. The parties of the first part will furnish at the time of the delivery of said deed a complete abstract of title to said property brought down to date, showing merchantable title in the parties of the first part, free of all encumbrances except such as the party of the second part agrees to assume and pay.

15. That in the event said party of the second part fails to pay any of the assessments, insurance

premiums, liens or encumbrances on or affecting said property when due, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be immediately due and payable.

16. That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default.

17. That time is and shall be the essence of this contract.

IN WITNESS WHEREOF, the parties hereto have hereunto [13] set their hands and seals the day and year herein first above written.

CHAS. E. WARREN.
MABEL D. WARREN.
F. GENN BROMLEY.

The following is a list of the personal property mentioned in the foregoing contract:

1 double P. & O. 11-inch plow.
1 spring-tooth cultivator (2 sections).
1 orchard truck (goose-neck).
1 ten-foot harrow.
1 set work harness.

1 spring-wagon used as trailer.
8 tons of barley hay.
1 bean tractor.
300 boxes.
1500 tree props, more or less.
1 two-h. p. electric motor.
260 feet 10-inch steel riveted pipe.
1 45-foot 8-inch belt.
1 power wood saw.
1 Oliver 8-inch single plow.
1 single cultivator.
1 two-horse wagon (low wheel).
1 gray mare.
1 bay mare.
1 cow.
2 tons cow hay.
10 fruit ladders.
800 trays, more or less.
1 dry fruit grader.
1 twenty h. p. electric motor.
1 No. 5 Krogh pump.
1 dipping plant.

State of California,
County of Santa Clara,—ss.

On this 4th day of December, in the year one thousand nine hundred and nineteen, before me, M. E. Empey, a notary public in and for the said county of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Chas. E. Warren, Mabel D. Warren, his wife, and F. Genn Bromley, known to me to be the persons whose names are subscribed to the within instrument and

acknowledged to me that they executed the same. [14]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of San Jose, County of Santa Clara, the day and year in this certificate first above written.

[Seal] M. E. EMPEY,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

(Title of Court and Cause.)

Summons.

Action brought in said District Court, and the complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

ARTHUR H. BARENDT,
Plaintiff's Attorney.

The President of the United States of America, GREETING: To Charles E. Warren and Mabel D. Warren, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, Second Divi-

sion, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 27th day of June in the year of our Lord one thousand nine hundred and twenty-one, and of our Independence the one hundred and forty-fifth.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [16]

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 27th day of June, 1921, and personally served the same on the 27th day of June, 1921, upon the therein named Charles E. Warren and Mabel D. Warren, by delivering to, and leaving with Charles E. Warren and Mabel D. Warren, each of the said defendants named therein personally at 2 miles northeast of the town of Cupertino, County of Santa Clara, in said District, an attested copy thereof,

together with a copy of the complaint, attached thereto.

J. B. HOLOHAN,
U. S. Marshal.
By I. W. Grover,
Office Deputy.

San Francisco, June 28th, 1921.

[Endorsed]: Filed Jun. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

(Title of Court and Cause.)

Notice of Motion to Strike Out, etc.

To the Above-named Plaintiff and to His Attorney, Arthur H. Barendt:

NOTICE IS HEREBY GIVEN YOU, and each of you, that the above-named defendants will move the above-entitled court at its courtroom in the United States Post Office Building in the City and County of San Francisco, State of California, on Monday, the 22d day of August, 1921, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, for an order to strike from the complaint of the plaintiff on file herein the following portions thereof, and each of them, to wit:

I.

From page two, that portion thereof commencing with line fifteen, and reading as follows, to wit: "that payment of interest and the balance of the principal under said contract, it was expressly provided, should be made by the defendants retaining title to sixty per cent (60%) of the crop grown on

the orchard each year during the life of the contract, and that as said crop was disposed of annually the defendants should receive sixty per cent (60%) of the proceeds of said crop, which proceeds, as stated in said contract, were to be credited by them to unpaid interest and balance of the principal due them from plaintiff under said contract."

II.

From page three, that portion thereof commencing with line fifteen, and reading as follows, to wit: "and plaintiff invested the sum of $4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in, the cultivation of said orchard." [18]

SAID MOTION WILL BE MADE upon the ground that said portions of said complaint are, and each of them is:

a. Surplusage.
b. Redundant.
c. The allegations of immaterial matter.

SAID MOTION WILL BE to strike out each of said portions separately and upon each of said grounds separately.

SAID MOTION WILL BE BASED upon this notice of motion and the complaint in said action.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants. [19]

State of California,
County of Santa Clara,—ss.

M. T. Gross, being first duly sworn, deposes and says: That she is and at all times hereinafter mentioned has been a citizen of the United States, over the age of twenty-one years; that on the 9th day of August, 1921, she personally served the above and foregoing notice of motion upon Arthur H. Barendt, the attorney for the plaintiff, by then and there depositing in the United States Post-office in the City of San Jose, County of Santa Clara, State of California, a copy of said notice of motion, inclosed in a sealed envelope plainly addressed to the said Arthur H. Barendt at his office at Mills Building, San Francisco, Cal., and on which the postage has been prepaid in full; that at all the times herein mentioned the attorneys for defendants had their offices in the City of San Jose aforesaid and the attorney for plaintiff had his offices at San Francisco, Calif., aforesaid, and there is, and was, a daily communication by mail between the said cities and towns; that the distance between the said place of deposit and the place of service is less than 50 miles.

M. T. GROSS.

Subscribed and sworn to before me this 9th day of August, 1921.

[Seal] DESMOND T. JENKENS,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Aug. 16, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

(Title of Court and Cause.)

Demurrer.

Comes now the defendants and demur to the complaint of the plaintiff herein and for cause of demurrer allege:

I.

That the first alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

II.

That the second alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said first alleged cause of action in said complaint stated is uncertain is this, that it does not appear therein, nor can it be ascertained therefrom:

a. In what the rehabilitation of said orchard consisted in which plaintiff expended the sum of Three Thousand Eight Hundred and Twenty-five Dollars ($3,825).

b. How or in what manner the plaintiff was damaged by investing the sum of Four Thousand Dollars ($4,000), or thereabouts, in the purchase of tools, machinery and implements necessary to the

proper farming of said fruit ranch mentioned in the complaint.

c. Whether or not the plaintiff in irrigating said acreage to the utmost capacity of the water actually available claims to have done more than was required of him to be done by the contract marked Exhibit "A" and attached to the complaint.

d. Whether or not plaintiff interprets said contract as meaning that the payment of the interest and the balance of the purchase price under said contract was to be paid solely out of the sixty per cent (60%) of the crop grown on the orchard [21] each year during the life of the contract.

e. When plaintiff delivered to the California Prune & Apricot Growers, Inc., the prunes alleged in said complaint to have been delivered to it.

f. When the plaintiff delivered to the California Co-operative Canneries the pears and peaches alleged to have been delivered by him to it.

g. What sum the defendants have received from the California Co-operative Canneries for the fruit delivered to it by plaintiff.

IV.

That the said first alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is herein alleged to be uncertain.

V.

That the said first alleged cause of action is said complaint stated is unintelligible for the reasons, and each of them, that it is herein alleged to be uncertain.

VI.

That the second alleged cause of action in said complaint stated is uncertain in this: that it does not appear therein, nor can it be ascertained therefrom:

a. When or where defendants wrongfully and unlawfully, or wrongfully or unlawfully, or at all, converted to their own use the personal property set forth therein.

b. Whether or not any portion of the property set forth in Paragraph Two of said alleged second cause of action is the personal property described in the list attached to Exhibit "A" and made a part of said complaint.

VII.

That said second alleged cause of action is unintelligible for the reasons, and each of them, that it is hereinbefore alleged to be uncertain. [22]

VIII.

That said second alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is hereinabove alleged to be uncertain.

IX.

That several causes of action have been improperly united in this: that a cause of action for breach of contract and damages therefor has been improperly united with a cause of action for the conversion of personal property.

X.

That several causes of action have been improperly united and not separately stated in said second

alleged cause of action in this: that a cause of action for breach of contract and damages has been joined and stated with a cause of action for the conversion of personal property.

WHEREFORE defendants pray that plaintiff take nothing and that they be hence dismissed with their costs.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants. [23]

State of California,
County of Santa Clara,—ss.

M. T. Gross, being first duly sworn, deposes and says: That she is and at all times hereinafter mentioned has been a citizen of the United States over the age of twenty-one years; that on the 9th day of August, 1921, she personally served the above and foregoing demurrer upon Arthur H. Barendt, the attorney for the plaintiff, by then and there depositing in the United States Postoffice in the city of San Jose, county of Santa Clara, State of California, a copy of said demurrer inclosed in a sealed envelope plainly addressed to the said Arthur H. Barendt at his office at Mills Building, San Francisco, Cal., and on which the postage had been prepaid in full; that at all the times herein mentioned the attorneys for defendants had their offices in the city of San Jose aforesaid and the attorney for plaintiff had his offices at San Francisco, Calif., aforesaid, and there is, and was, a daily communication by mail between the said cities and towns; that

the distance between the said place of deposit and the place of service is less than 50 miles.

M. T. GROSS.

Subscribed and sworn to before me this 9th day of August, 1921.

[Seal] DESMOND T. JENKINS,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Aug. 16, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

(Title of Court and Cause.)

Amended Demurrer.

Come now the defendants and demur to the complaint of the plaintiff herein and for cause of demurrer allege:

I.

That the first alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

II.

That the second alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said first alleged cause of action in said complaint stated is uncertain in this: that it does

not appear therein, nor can it be ascertained therefrom:

a. In what the rehabilitation of said orchard consisted in which plaintiff expended the sum of Three Thousand Eight Hundred Twenty-five Dollars ($3,825).

b. In what amount the value of said property was enhanced by the expenditure on the part of the plaintiff of the said sum of Three Thousand Eight Hundred Twenty-five Dollars ($3,825).

c. In what amount or sum the plaintiff has increased the value of said acreage during his tenure thereof by reason of his care in cultivating, and labor bestowed upon the land and trees of said property.

d. How or in what manner the plaintiff was damaged by investing the sum of Four Thousand Dollars ($4,000) or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch mentioned in the complaint. [25]

e. What, if anything, was the reasonable value of the use and occupancy of the premises described in the complaint during the period that it was occupied by plaintiff.

f. What was the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the purchase thereof alleged in the complaint.

g. Whether or not the plaintiff ever offered to, or did, restore to defendants or either of them

everything or anything of value received by him under said contract.

h. Whether or not the personal property on said ranch alleged to have been taken possession of by defendants is any part of the tools, machinery and implements alleged to have been purchased by the plaintiff for the sum of Four Thousand Dollars ($4,000) or thereabouts.

i. Whether or not the plaintiff ever, on or before the first day of December, 1920, offered to pay to defendants or either of them the balance of the interest due on the first day of December, 1920, under the contract of purchase set forth in the complaint.

j. Whether or not plaintiff interprets said contract as meaning that the payment of the interest and the balance of the purchase price under said contract was to be paid solely out of the Sixty Per Cent (60%) of the crop grown on the orchard each year during the life of the contract.

k. When plaintiff delivered to the California Prune & Apricot Growers, Inc., the prunes alleged in said complaint to have been delivered to it.

l. When the plaintiff delivered to the California Co-operative Canneries the pears and peaches alleged to have been delivered by him to it.

m. What sum the defendants have received from California Co-operative Canneries for the fruit delivered to it by plaintiff. [26]

n. When the balance alleged to be due from the California Prune & Apricot Growers, Inc., for fruit delivered to it, as alleged in the complaint, is due or payable to the defendants.

IV.

That the said first alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is herein alleged to be uncertain.

V.

That the said first alleged cause of action in said complaint stated is unintelligible for the reasons, and each of them, that it is herein alleged to be uncertain.

VI.

That several causes of action have been improperly united in said first cause of action in this: That a cause of action for breach of contract and damages therefor has been improperly united with a cause of action based upon a rescission of the same contract.

VII.

That several causes of action have been improperly united and not separately stated in said action in this: This a cause of action for breach of contract and damages therefor has been improperly united with a cause of action based upon a rescission of the same contract.

VIII.

That the second alleged cause of action in said complaint stated is uncertain in this: that it does not appear therein, nor can it be ascertained therefrom:

a. Whether or not any portion of the property set forth in Paragraph Two of said alleged Second Cause of Action is the personal property described

in the list attached to Exhibit "A" and made a part of said complaint.

b. Whether or not any portion of the property set forth in [27] Paragraph Two of said alleged second cause of action is any portion of the tools, machinery and implements alleged to have been paid for by plaintiff for Four Thousand Dollars ($4,000).

IX.

That said second alleged cause of action is unintelligible for the reasons, and each of them, that it is hereinbefore alleged to be uncertain.

X.

That said second alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is hereinbefore alleged to be uncertain.

XI.

That several causes of action have been improperly united in said second cause of action in this: that a cause of action for breach of contract and damages therefor has been improperly united with a cause of action for the conversion of personal property.

XII.

That several causes of action have been improperly united and not separately stated in said second alleged cause of action in this: that a cause of action for breach of contract and damages has been joined and stated with a cause of action for the conversion of personal property.

WHEREFORE defendants pray that plaintiff take nothing and that they be hence dismissed with their costs.

EDWIN A WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

Received a copy of the amended demurrer this 17th day of August, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff. [28]

[Endorsed]: Filed Aug. 17, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

(Title of Court and Cause.)

Amended Notice of Motion to Strike Out, etc.

To the Above-named Plaintiff and to His Attorney, Arthur H. Barendt:

NOTICE IS HEREBY GIVEN YOU, and each of you, that the above-named defendants will move the above-entitled court at its courtroom in the United States Postoffice Building in the City and County of San Francisco, State of California, on Monday, the 22d day of August, 1921, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, for an order to strike from the complaint of the plaintiff on file herein the following portions thereof, and each of them, to wit:

I.

From page two, that portion thereof commencing with line fifteen, and reading as follows, to wit:

"that payment of interest and the balance of the principal under said contract, it was expressly provided, should be made by the defendants retaining title to sixty per cent (60%) of the crop grown on the orchard each year during the life of the contract, and that as said crop was disposed of annually the defendants should receive sixty per cent (60%) of the proceeds of said crop, which proceeds, as stated in said contract, were to be credited by them to unpaid interest and balance of the principal due them from plaintiff under said contract."

II.

From page three, that portion commencing with line eleven, and reading as follows, to wit: "and it was necessary to expend large sums of money in its rehabilitation and plaintiff has expended a sum exceeding $3,825.00 in the rehabilitation [30] of said orchard in so much that the value of said property has been greatly enhanced."

III.

From page three, that portion thereof commencing with line fifteen, and reading as follows, to wit: "and plaintiff invested the sum of $4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in, the cultivation of said orchard."

IV.

From page three, that portion thereof commencing with line twenty, and reading as follows, to wit: "That the year 1920 was one of exceptional

drouth and was the fourth successive dry year in the said County of Santa Clara, and there was neither rainfall nor water available for the adequate irrigation of said ranch, nevertheless plaintiff irrigated said acreage to the utmost capacity of the water actually available and by reason of the care in cultivating and the labor bestowed upon the land and trees on said property, plaintiff succeeded in raising crops and equal of any produced on any similarly situated land devoted to the cultivation of like fruits; and plaintiff has thereby increased the value of said acreage during his tenure thereof."

V.

From page five, that portion thereof commencing with line eighteen and reading as follows, to wit: "That it was provided and agreed by the terms of said contract that payment of the unpaid interest should be made by defendants by crediting the plaintiff on account of the unpaid interest, the said sixty per cent of said crops when disposed of, by defendants to the said unpaid interest and said balance of said purchase price, and by adding to the said principal any unpaid interest at the time of the sale and disposal of said sixty per cent of said crops, and [31] that said unpaid interest should also bear interest at the rate of six per cent per annum in the same manner as the unpaid balance of said principal."

VI.

From page seven, that portion thereof commencing with line one, and reading as follows: "the

said sum of $6,000, paid to defendants under said contract on December 1, 1919."

VII.

From page seven, that portion thereof commencing with line two, and reading as follows, to wit: "the sum of $3,525 paid, laid out and expended by plaintiff for help in the farming of said property and for the value of his own labor thereon."

VIII.

From page seven, that portion thereof commencing with line five and reading as follows, to wit: "$2,500 which plaintiff alleges to be the enhanced value of said property resulting from the labor and care bestowed thereon by plaintiff."

SAID MOTION WILL BE MADE upon the ground that said portions of said complaint are, and each of them is:

a. Surplusage.
b. Redundant.
c. The allegations of immaterial matter.

SAID MOTION WILL BE to strike out each of said portions separately and upon each of said grounds separately.

SAID MOTION WILL BE BASED upon this amended notice of motion and the complaint in said action.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

Received a copy of the within amended notice of motion this 17th day of August, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff. [32]

[Endorsed]: Filed Aug. 17, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the city and county of San Francisco, on Monday, the 22d day of August, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

Minutes of Court—August 22, 1921—Order Overruling Demurrer and Denying Motion to Strike Out Parts, etc.

Defendants' amended demurrer to complaint and amended motion to strike out parts, came on to be heard and after arguments being submitted it was ordered that said demurrer be and the same is hereby overruled and that said motion be and the same is hereby denied. [34]

(Title of Court and Cause.)

Notice of Overruling Demurrer and Denying Motion to Strike.

To the Defendants Above Named, and to Messrs. Edwin A. Wilcox and Fry & Jenkins, Their Attorneys:

YOU AND EACH OF YOU will please take notice that His Honor, Judge William C. Van Fleet, has overruled the demurrer of the defendants and has denied their motion to strike, with leave to answer the complaint of the plaintiff within ten days next after the service of this notice.

Dated: August 22d, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

I do hereby certify that I have this day mailed, postage prepaid, to Messrs. Wilcox, Fry & Jenkins, attorneys for defendants, a full, true and correct copy of the within notice of overruling demurrer and denying motion to strike.

Dated: August 22d, 1921.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 23, 1921. W. M. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

(Title of Court and Cause.)

Answer.

Come now the defendants and answering the complaint of the plaintiff on file herein deny, admit and allege as follows, to wit:

I.

Answering the allegations of Paragraph II of the first alleged cause of action in said complaint alleged, defendants deny that payment of said interest and/or of the balance of the principal payable under said contract attached to the complaint and marked Exhibit "A," it was expressly, or at all, provided in said contract should be made by the defendants, or either of them, retaining title to sixty per cent (60%), or any, per cent of the crop grown on said orchard each, or any, year during the life of the contract, and/or that as said, or any, crop was disposed of annually, or shall, the defendants, or either of them, should receive sixty (60%) or any, per cent, of the proceeds of said, or any, crop, or which proceeds as stated in said contract, or at all, were to be credited by them to unpaid interest and/or the balance of the principal due them from plaintiff under said contract, and defendants allege that payment of said interest and of the said balance of the principal payable was to be made in the manner and at the times specified in said Exhibit "A" and not otherwise;

II.

Answering the allegations of Paragraph III of

said alleged first cause of action, defendants deny that the plaintiff, after his entry into possession and/or occupation of said acreage, or at any time or at all, commenced to and/or continued to thereafter, or at all, or did, during the entire, or any part [36] of, the year of 1920, or at any time or at all, farm said land in a first-class, farmer-like and/or orchardist-like manner; deny that plaintiff found said orchard in a much, or any, run down and/or neglected condition, or that said orchard was in a neglected and/or run down condition; deny that it was necessary to expend large, or any sums, or sum, of money, in its rehabilitation and/or that plaintiff has expended a sum exceeding $3,825.00, or any other sum, or has expended any sum or sums whatsoever in the rehabilitation of said orchard, or that the value of said property has been thereby, or at all, enhanced; defendants allege that they have no information or belief upon the subject sufficient to enable them to answer and on that ground they deny, that plaintiff invested the sum of $4,000, or thereabouts, or any other sum, in the purchase of tools, machinery, and/or implements necessary to the proper farming of said fruit ranch, or at all, and/or that all, or any, of said tools, machinery and/or implements were delivered to, and/or used in, the cultivation of said orchard.

Defendants deny that there was neither rainfall nor water available for the adequate irrigation of said ranch; deny that plaintiff irrigated said acreage to the utmost capacity of the water actually, or at all, available, and/or by reason of the care

in cultivating and/or the labor bestowed upon the land and/or trees on said property, or at all, plaintiff succeeded in raising crops the equal of any produced on any similarly situated land devoted to the cultivation of like, or any, fruits and/or that plaintiff has thereby, or at all, increased the value of said acreage during his tenure thereof, or at all, and alleges the fact to be that there was rainfall and water available for the adequate irrigation of the whole of said ranch, but that plaintiff failed to irrigate said acreage to the full capacity of said water actually available, and that by reason of plaintiff's [37] said failure to irrigate said acreage to the full capacity of said water actually available, and of his lack of care in cultivating and lack of adequate and properly skilled labor upon the land and trees on said property, plaintiff failed to raise crops the equal of those raised on similarly situated land devoted to the cultivation of like fruits, properly irrigated, cultivated and cared for, and by reason of plaintiff's said failure to properly irrigate and care for said orchard and land in a farmer-like and orchardist-like manner the value of said land was decreased in the sum of $10,000.

Defendants deny that the balance to be paid to and/or received by defendants, or either of them, from the California Prune & Apricot Growers, Inc., for prunes delivered to it as in the said complaint alleged, or at all, and/or to be by defendants, or either of them, applied to the payment of principal and/or unpaid, or any, interest will be, or is, the sum of $1,000, or any other sum whatsoever; deny

that there is any balance, or any further payments at all, to be made upon said prunes, either to plaintiff or defendants, or either of them, and allege the fact to be that the California Prune & Apricot Growers, Inc., is a co-operative marketing organization and that all fruit delivered to said California Prune & Apricot Growers, Inc., is paid for from the proceeds received by said California Prune & Apricot Growers, Inc., for the sale of that year's crop, and that the payments made by said organization as in said complaint alleged were advances made upon the amount that said organization estimated said prunes would bring upon sales to be made by it, and that said advances so made are greater than was, or will be, received for said crop of 1920, and, under the rules and regulations of said organization, and under which said prunes were received by it, defendants will be called upon to pay back a portion of said advances, [38] the amount of which defendants are not now advised.

Defendants deny that plaintiff, upon the delivery of said fruit to the California Co-operative Canneries, as in said complaint alleged, or at all, immediately and/or in person or at all, notified said California Co-operative Canneries that sixty (60%) or any, per cent of all, or any, of said, or any, fruit and/or the proceeds of sale thereof belonging to and/or should be credited to defendants, and/or such, or any, credit was immediately, or at all, thereupon, or at all, given by said canneries to said defendants, or either of them; deny that the value of all, or any, of said fruit delivered to said can-

neries was and/or is not less than the sum of Five Thousand Dollars ($5,000), or any other sum in excess of Eight Hundred Ninety-four and 07/100 Dollars ($894.07) and/or the said sixty (60%) per cent to be applied by defendants to the balance of said principal and/or unpaid, or any, interest under said contract is the sum of Three Thousand Dollars ($3,000), or any other sum in excess of Two Hundred Nine and 25/100 Dollars ($209.25) and defendants allege the fact to be that the said canneries are a co-operative organization for the canning of fruit and marketing of canned fruit, and that all fruit delivered to said canneries is paid out of the profits of that year's operation, and that there became due from said canneries to plaintiff as payment in full for all fruit delivered to it by him, as in said complaint alleged, the sum of Eight Hundred Ninety-four and 07/100 Dollars ($894.07), and that of this sum there was paid to plaintiff, or for the account of plaintiff, the sum of Six Hundred Eighty-five and 07/100 Dollars ($685.07), and there was paid to defendants the sum of Two Hundred Nine and 25/100 Dollars ($209.25), and no more, and that plaintiff failed, refused and neglected to pay sixty (60%) per cent of the proceeds of said fruit to defendants, or either of them. [39]

Defendants deny that all, or any, of said payments on account of said principal and/or unpaid interest as so alleged in the complaint, or at all, made by plaintiff to defendants, or either of them, as provided for and/or agreed upon in said contract, or at all, other than the sum of Two Hundred

Eighty-eight and 69/100 Dollars ($288.69) from grapes, the sum of One Thousand Five Hundred Sixty-six and 88/100 Dollars ($1,566.88) from the California Prune & Apricot Growers, Inc., and the sum of Two Hundred Nine and 25/100 Dollars ($209.25) from the California Co-operative Canneries, were accepted by defendants, or either of them, and defendants allege that said payments were made in installments upon the dates and in the amounts as follows:

Sept. 27, 1920.	From California Prune & Apricot Growers, Inc., for prunes	$ 414.65
Oct. 12, 1920.	From grapes	110.19
Oct. 21, 1920.	From grapes	178.50
Nov. 6, 1920.	From California Prune & Apricot Growers, Inc., for prunes	444.75
Nov. 13, 1920.	From California Prune & Apricot Growers, Inc., for prunes	707.48
Nov. 30, 1920.	From California Co-operative Canneries	209.25
		$2064.82

Defendants allege that said payments were applied as received upon unpaid interest, and were all the payments made by, or for, plaintiff to defendants from the crops sold;

Defendants deny that it was provided and/or agreed by the terms, or any term, of said contract, that payment of the unpaid interest should be

made by defendants, or either of them, by crediting the plaintiff on account of the unpaid interest, the said sixty (60%), or any, per cent of said crops when disposed of, or at all, by defendants, or either of them, to the said, [40] or any, unpaid interest and/or said balance of said, or any, unpaid purchase price, and/or by adding to the said principal any unpaid interest at the time of the sale and/or disposal of said sixty (60%) or any, per cent of said crops, or crop, and/or that said unpaid interest should also bear interest at the rate of six (6%) per cent per annum in the same manner as the unpaid balance of said interest, and deny that said principal and/or unpaid interest was to be paid in any way other than as stated in said Exhibit "A."

III.

Answering the allegations of Paragraph IV of said first cause of action alleged, defendants deny that plaintiff, on or about the 30th day of September, 1920, or at any time, or at all, or ever, placed said ranch property in the temporary, or any, care of a competent foreman, and alleges that the person in whose care plaintiff left said ranch on the 30th day of September, 1920, was a person unskilled in the care of orchards; Deny that during his said absence and/or on or about the 1st day of December, 1920, or at any other time, or at all, the defendants, or either of them, wrongfully and/or unlawfully and/or without the knowledge or consent of plaintiff, entered upon, seized and/or occupied and/or appropriated to their own use all, or any,

of the said land and/or premises and/or all, or any, of the personal property described in said contract, or together with all, or any, of the said personal property placed thereon by plaintiff, and deny that they ever, or at all, took possession of, or appropriated to their own use any of the personal property not mentioned in said contract; admit that on or about the 8th of December, 1920, defendants entered upon and took possession of, all the real property described in said contract, and such portion of the personal property therein described, as was situated on said property at said time, for the reason that plaintiff had breached said contract as in this answer alleged, and that all of the rights of plaintiff thereunder had terminated; defendants [41] deny that they claimed they were, or either of them was, entitled to take over and/or resume possession of all, or any, of the personal property on said ranch, other than the personalty described and mentioned in said contract, or claimed that plaintiff had forfeited all, or any, right, title and/or interest in and/or to the personal property, other than that mentioned and described in said contract, and/or all, or any, of said balance of said sixty (60%) per cent of said, or any, crops then, or at all, unsold; deny that defendants, or either of them, ever since, or at any time prior to December 8th, 1920, have held and/or possessed any portion of the property, real or personal, described in said complaint, and deny that since said time they have held and/or possessed and/or do now retain and/or hold and/or possess, without any legal or other

right, all, or any, of said property, and deny that they hold, or either of them holds, any of said property at all, except that portion mentioned in said contract, and on said real property at the time the same was taken into possession by defendants; deny that defendants ever since, or at all, have held and/or possessed and/or do now, or at all, retain and/or hold and/or possess without any legal or other right, all, or any, of said property; deny that they have, or either of them has, excluded, and/or now do exclude, plaintiff therefrom, except as to that said real property described in said contract, and that portion of the personal property therein described on said real property, on December 8th, 1920; deny that defendants have, or that either of said defendants has, violated and/or broken their contract with plaintiff.

Defendants deny that plaintiff has duly and/or fully, or at all, performed all, or any, of the terms and/or conditions of said contract on his part to be performed.

Defendants allege that plaintiff was in possession of the real property described in said contract from the 1st day of [42] December, 1919, to the 8th day of December, 1920; that during the whole of said period he failed and neglected to farm said premises in a first class, farmer-like and orchardist-like manner; that during the farm and orchard year of 1920, he failed and neglected to plow said orchard at all; that plaintiff failed to double disc more than one half of said orchard; that plaintiff failed and neglected to plow, cultivate or irrigate at all one

and one-half (1½) acres of said land planted to walnuts and by reason of said failure and neglect all of said trees died; that plaintiff failed and neglected to prune the trees upon said land at the proper time or in the proper manner; that plaintiff failed and neglected to remove all, or any, borers from the roots of the same; that he failed and neglected to remove all, or any, dead trees as soon as customary, or at all, and failed and neglected to replant dead trees; that defendant failed and neglected to irrigate more than one-half (½) of said orchard, though there was water available to irrigate the whole thereof, and irrigation was necessary on the whole of said orchard; that plaintiff failed and neglected to eradicate all, or any, rodents from said orchard, and by reason of said failure the gophers girdled during said time seventy-three (73) fruit trees, as a result of which all of said trees died; that he failed and neglected to spray the pear trees as often as is customary, and failed and neglected to spray more than one-half (½) the apricot trees at all; that in order for plaintiff to have farmed said ranch in a farmer-like and orchardist-like manner it was necessary that plaintiff should have done and performed each and every act he is alleged to have failed or neglected to do or perform; that plaintiff failed and neglected to pay any of the State and County taxes levied or assessed against said property during the year of 1920; that plaintiff has never paid any portion of the balance of the interest due and payable on the 1st day of December, 1920; That during the last

week in November, 1920, the plaintiff informed the defendants that he had no money with which [43] to pay the balance of the unpaid interest due on December 1st, 1920, or with which to care for or farm said real property, and that he was going to discharge the man hired by him to care for said place, the plaintiff being unable to pay him his wages, and that he then owed him a large sum of money, and that he would not do anything on said ranch until the following February, and that if defendants wanted said ranch cared for they would have to do it themselves; that plaintiff thereupon discharged his said man and said man, in pursuance of his discharge, left said ranch on the 8th day of December; that it was necessary for the proper care of said orchard that a large amount of work should be done there on during the said period between December 8th, 1920, and February 1st, 1921; that because of plaintiff's breaches of said contract and of his failures to properly farm and care for said orchard, and of the facts in this answer alleged, defendants elected to declare all of the rights of the plaintiff under said contract terminated and all payments thereupon made by plaintiff to defendants treated as compensation for the rental and occupancy of the said land by plaintiff up to the 8th day of December, 1920, and took possession of said real property on the 8th day of December, 1920, and of so much of the personal property described in said contract as was then on said premises.

Defendants deny that by said acts and/or conduct, or any of them, of defendants, or either of

them, in said complaint alleged, or at all, and/or by their said, or any, breach of their said, or any, contract, with plaintiff, defendants, or either of them, have caused great, or any, loss and/or damage to plaintiff; deny that plaintiff has been damaged in the sum of Twelve Thousand Twenty-five Dollars ($12,025), or any sum, or at all; deny that said, or any damages suffered thereby, or at all, by plaintiff are, or is, the said sum of Six Thousand Dollars ($6,000) paid to defendants under said contract on December 1st, 1919, the sum of [44] Three Thousand Five Hundred Twenty-five Dollars ($3,525), or any sum, paid, laid out and/or expended by plaintiff for help in the farming of said property and/or for the value of his own labor thereon and/or Two Thousand Five Hundred Dollars ($2,500), or any other sum, which is the enhanced value of said property resulting from the labor and/or care bestowed thereon by plaintiff, or at all; allege that they have no information or belief on the subject sufficient to enable them to answer, and upon that ground deny, that the sum of Three Thousand Five Hundred Twenty-five Dollars ($3,525), or any other sum, was laid out and/or expended by plaintiff for help in the farming of said property, and/or for the value of his own labor thereon; deny that said property was enhanced in value in the sum of Two Thousand Five Hundred Dollars ($2,500), or any other sum, or at all, from the labor and/or care bestowed thereon by plaintiff, or was at all enhanced in value.

I.

Answering the second alleged cause of action in said complaint stated, defendants refer to, incorporate herein, and make a part hereof, their answer to the said first alleged cause of action.

II.

Defendants deny that defendants, or either of them, on or about December 1st, 1920, wrongfully and/or unlawfully, or at all, took and/or have since held possession of and/or converted to their own use and/or have deprived plaintiff of, the rightful, or any, possession of all, or any, of the following described personal property: [45]

One tractor.
One bean sprayer.
Hay for feed.
Lumber.
One cultivator.
One disc.
300 fruit trays.
150 large boxes.
Chickens.
Cook-stove.
Carpet.
Riding-horse.
Grass rug.
Ice-chest.
Window screens.
Brass curtain rods.
Linoleum.
Trunk and other
personal effects.

Deny that any of said property is of a value greater than that set opposite each item, as follows:

One tractor	$1,000.00
One bean sprayer	400.00
Hay for feed	62.50
Lumber	15.00
One cultivator	75.00
One disc	75.00
300 fruit trays	216.00
150 large boxes	75.00
Chickens	25.00
Cook-stove	10.00
Carpet	25.00
Riding-horse	25.00
Grass rug	10.00
Ice-chest	15.00
Window screens	1.50
Brass curtain rods	15.00
Linoleum	24.00

Trunk and other personal effects—no value.

Deny that the plaintiff, at the time of the said wrongful, or any, conversion, was the owner and/or entitled to the exclusive or any possession of the said tractor or Bean Sprayer, and allege the fact to be that said implements were sold to plaintiff upon contracts of conditional sale and that each of said articles was retaken by the vendor thereof under said contract because of the failure of the plaintiff to pay for the same according to the terms of said contracts of conditional sale.

Deny that the aggregate, or any value, of said

personal property described in said second cause of action was, or is, any [46] sum in excess of $2,069.00.

III.

Answering Paragraph II of said alleged second cause of action defendants alleged that they notified plaintiff that all of said personal property on said real property on the 8th day of December, 1920, was then subject to his order and disposal, but the said plaintiff never has given any order for the disposal thereof, nor has he ever informed defendants, or either of them, what he wanted done therewith.

WHEREFORE defendants pray that plaintiff take nothing, and that they have their costs of suit herein.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

State of California,
County of Santa Clara,—ss.

Charles E. Warren, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and, as to those matters, he believes it to be true.

CHARLES E. WARREN.

Subscribed and sworn to before me this 31st day of August, 1921.

[Seal] DESMOND T. JENKENS,
Notary Public in and for the County of Santa Clara, State of California. [47]

State of California,
County of Santa Clara,—ss.

M. T. Gross, being first duly sworn, deposes and says: That she is and at all times hereinafter mentioned has been a citizen of the United States over the age of twenty-one years; that on the 31st day of Aug., 1921, she personally served the above and foregoing answer upon Arthur H. Barendt, the attorney for the plaintiff, by then and there depositing in the United States Postoffice in the City of San Jose, County of Santa Clara, State of California, a copy of said answer inclosed in a sealed envelope plainly addressed to the said Arthur H. Barendt, at his office at Mills Building, San Francisco, Cal., and on which the postage had been prepaid in full; that at all the times herein mentioned the attorneys for defendants had their offices in the City of San Jose aforesaid and the attorney for plaintiff had his offices at San Francisco, Calif., aforesaid, and there is, and was, a daily communication by mail between the said cities and towns; that the distance between the said place of deposit and the place of service is less than 50 miles.

M. T. GROSS.

Subscribed and sworn to before me this 31 day of August, 1921.

[Seal] DESMOND T. JENKENS,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Sep. 3, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

(Title of Court and Cause.)

Stipulation Waiving Jury.

In the above-entitled matter plaintiff having heretofore demanded a jury and having on the 6th day of January, 1922, announced in open court his desire to waive his right to a trial by a jury, and defendants consenting to such waiver; now therefore it is hereby stipulated by and between counsel for the parties plaintiff and defendant that a trial of said cause by a jury be and it is hereby waived.

ARTHUR H. BARENDT,
Attorney for Plaintiff.
EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Defendants.

Dated: January 19, 1922.

Approved: VAN FLEET,
Judge.

The receipt of a copy of the within stipulation waiving jury is hereby admitted this 19th day of January, 1922.

EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Defendants.

[Endorsed]: Filed Jany. 20, 1922. Walter B. Maling, Clerk. [49]

(Title of Court and Cause.)

Oral Opinion of Hon. Wm. C. Van Fleet, Rendered Monday, Sept. 11, 1922.

ARTHUR H. BARENDT, Esq., Attorney for Plaintiff.

BERT SCHLESINGER, Esq., and E. A. WILCOX, Esq., Attorneys for Defendants.

The COURT (Orally).—In the case of Bromley vs. Warren, heretofore tried and submitted, the parties entered into a contract for the sale and purchase of orchard property in Santa Clara Valley. The terms and interpretation of the provisions of the contract were fully discussed and the views of the Court given at the argument and I need not repeat them. The action is brought by the plaintiff, the purchaser, to recover a payment made by him under the contract and the value of certain property upon the place, growing out of the fact that the defendant entered upon the place within the first year, or almost immediately after the termination of the first year, and seized the property with the plaintiff's personalty that was found thereon, on the theory that the plaintiff had breached the contract and the action proceeds upon the theory that the entry of the defendant was a breach of the contract on his part. I am not going to review the evidence but after its careful consideration it is sufficient

for me to say that in my view plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements; and that he was entirely within his rights in treating the conduct of the defendant as a breach of the contract by the latter and suing to recover the moneys that had been paid by him upon the contract with the value of the personal property taken [50] by the defendant and also the expenditures by him made in undertaking to carry out the contract. The payment made by the plaintiff was $6,000 and that he is entitled to recover. I find that the value of the personal property belonging to the plaintiff that was upon the premises when taken over by the defendant to be $1,800 and I find the amount of money expended by the plaintiff over and above what he received in the way of returns from crops, etc., to be $1,200 and judgment will be entered in favor of the plaintiff in the total of these sums.

[Endorsed]: Filed Sept. 20, 1922. Walter B. Maling, Clerk. [51]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 25th day of January, 1922, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Arthur H. Barendt, Esq., appearing as attorney for plaintiff and Bert Schlesinger and E. A. Wilcox, Esqrs., appearing as attorneys for defendant;

and the trial having been proceeded with on the 26th and 27th days of January in said year, and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its oral opinion and ordered that judgment be entered in favor of the plaintiff and against the defendants in the sum of $9,000.00 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that F. Genn Bromley, plaintiff, do have and recover of and from Charles E. Warren and Mabel D. Warren, defendants, the sum of nine thousand and no/100 ($9,000.00) dollars, together with his costs herein expended taxed at $55.40.

Judgment entered September 11, 1922.

WALTER B. MALING,
Clerk. [52]

(Title of Court and Cause.)

Petition for a New Trial.

Your petitioners, Charles E. Warren and Mabel D. Warren, the defendants in the above-entitled cause, file this their petition for a new trial herein and move the court to grant a new trial in the above-entitled cause and to vacate and set aside the final judgment heretofore made and entered herein in favor of the said plaintiff and against the said de-

fendants and to grant said defendants a new trial of this action upon the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment herein.

(2) That said decision and judgment is against law.

(3) Errors in law occurring at the trial and excepted to by the defendants.

That the papers on which this petition for a new trial is to be made are the pleadings and papers on file in the above-entitled action and upon the minutes of the court, and the reporter's transcript of his shorthand notes taken on the trial of said action.

The following is a specification of the particulars wherein the evidence is claimed to be insufficient to justify the decision and judgment rendered herein, viz:

I.

That the evidence indisputably shows that the plaintiff had failed to perform the terms of his contract at the time of the defendants' re-entry, and had not performed at any time, or offered to perform. [53]

(a) That he had failed to farm the orchard in a first-class orchardist-like manner as required by the contract to purchase the orchard in this:

He failed to irrigate the orchard at the proper season of the year, thereby causing a large number of fruit trees to die and to receive insufficient moisture. That he failed to remove dead trees from the orchard and to replant said trees as the contract required him to do.

(b) That he failed to irrigate large portions of the orchard as the contract required.

(c) That he failed to prune the trees in the orchard at the proper season, or at all, causing an almost total failure of crops.

(d) That he failed to exterminate rodents and other pests as far as reasonably possible and in consequence thereof seventy-three of the fruit trees in said orchard died.

(e) That he failed to plow and cultivate the orchard in a first-class manner as required by the contract.

(f) That he failed to pay the taxes against the property as he was required to do under the contract.

(g) That the defendants, in consequence of plaintiff's failure to pay said taxes were compelled to pay the same and the plaintiff never offered to repay the defendants therefor.

(h) That the plaintiff failed to pay the interest on the unpaid purchase price of the orchard as required by the contract; that there was due from the plaintiff to the defendants as interest on December 1, 1920, the sum of Two thousand seven hundred Dollars ($2,700.00).

(i) That the plaintiff never offered to pay said interest.

(j) The evidence conclusively shows that the plaintiff had abandoned the premises before the re-entry of the defendants.

(k) That the evidence indisputably shows that the employees [54] of the plaintiff on said or-

chard left their employment because plaintiff failed to pay them.

(l) That plaintiff had openly announced that he had given up the orchard.

(m) That he would invest no money of his own in the orchard.

(n) That at the time of the re-entry of defendants the orchard was vacant and such entry was absolutely necessary for the preservation of said orchard.

(o) That at no time did plaintiff offer to return to said premises or to perform his contract with the defendants.

(p) That the evidence indisputably shows that plaintiff frequently announced that he was impecunious and unable to run the orchard.

(q) That the evidence shows that plaintiff told the defendants and other persons that he expected to leave the orchard and to engage in some other occupation, and that he would not take the place back.

(r) The evidence indisputably shows that plaintiff failed *to* refused to perform his contract and he failed to fulfill the stipulations on his part to be kept and performed, and therefore he was not entitled to recover back the moneys he had paid to the defendants on account of the purchase price of the orchard or for improvements made by him on said orchard, or to recover from the said defendants any money whatever.

(s) That the evidence indisputably shows that the said defendants did not breach their contract with plaintiff, and that said defendants had not

caused a great loss and/or damage or any loss or damage to plaintiff in a sum exceeding Twelve thousand and Twenty-five Dollars ($12,025.00) or in any sum of money whatever or at all.

(t) That there is no evidence to show that the [55] plaintiff had laid out or expended the sum of Three thousand Five hundred and Twenty-five Dollars ($3,525.00), or any other sum of money in the cultivation of said orchard and including the alleged value of his own labor thereon.

(u) The evidence indisputably shows that said orchard was not enhanced in value in any sum of money whatever resulting from any labor or care bestowed thereon by the plaintiff or any one working for plaintiff.

(v) That the evidence indisputably shows that plaintiff expended no money whatever in the cultivation of the orchard.

(w) The evidence absolutely fails to show that on or about December 1st, 1920, or at any time whatever, or at all, the defendants wrongfully or unlawfully took and have since held possession of or converted to their own use or have deprived plaintiff of the right of possession of any personal property whatever or of anything of value.

The following is a specification of the particular errors of law relied upon:

First: The Court erred in deciding that the defendants had no right to retain the money paid by plaintiff on account of the purchase price of said orchard, cost of improvement or other moneys paid by plaintiff to the defendants as compensation for

the rental and occupation of the said orchard as provided by Section 16 of the contract entered into between the plaintiff and the defendants, which reads as follows:

> "That in the event said party of the second part fails to perform *any* of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and *all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of* [56] *the said land up to the time of such default";*

as the evidence conclusively shows that plaintiff had failed to perform many of the material conditions of the contract on his part to be kept and performed, namely; that he failed to plow, cultivate, and care for the orchard in a first-class farmer-like way; that he failed to irrigate the orchard at the proper season of the year thus causing a large number of fruit trees therein to die and to receive insufficient moisture; he failed to remove dead trees from the orchard and to replace them with new trees; that he failed to irrigate large portions of the orchard; that he failed to prune the fruit trees in the orchard in the proper season for pruning or at all, thereby causing an almost total failure of fruit crop; that he failed to exterminate rodents and other pests as far as reasonably possible in consequence of which seventy-three fruit trees in said orchard died; he failed to pay the taxes against

the property and the defendants were obligated to do so in order to prevent said property from being sold for taxes; that he failed to repay or offer to repay to the defendants the taxes paid by them as aforesaid; that he failed to pay the interest on the unpaid purchase price of the land; that there was due from plaintiff to the defendants for interest on December 1, 1920, the sum of two thousand seven hundred dollars ($2,700.00); that he never offered to pay said interest; that he abandoned the premises before the re-entry of the defendants; that the employees of plaintiff on said orchard left their employment because plaintiff failed to pay them; that plaintiff openly announced that he had given up the orchard; that he would advance no money of his own therein; that at no time had plaintiff offered to return to said premises and/or perform his contract. That plaintiff frequently announced that he was impecunious and unable to run and operate the orchard; that he told the defendants and other persons that [57] he expected to leave the premises and engage in some other occupation and that he would not take the orchard back.

Second: That the Court erred in deciding that the following written notice, namely:

> "Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of lots 5 & 6, and part of the northeast quarter of the southeast

> quarter of Sec. 10, Township 7, South Range 2 West, M. D. B. & M., Santa Clara County, California, and personally thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement,''

given by the defendants to plaintiff constituted a rescission of the contract for the reason that when said notice was given plaintiff was in default in the particulars hereinbefore specified; that he had abandoned the premises and the notice specifically states that all moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land as provided by Section 16 of the Agreement,

> ''All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement.''

Third: That the Court erred in finding that the defendants put an end to the contract and in not finding that the defendants stood squarely on the contract made with the plaintiff.

Fourth: That the Court erred in not finding that the defendants were entitled to retain all moneys paid to them by [58] plaintiff pursuant to provisions of Section 16 of the contract or agreement made between plaintiff and defendants as aforesaid.

Fifth: The Court erred in finding the defend-

ants entered and took possession of the premises without right.

Sixth: The Court erred in finding that there was a failure of consideration on the part of the defendants and that therefore plaintiff was entitled to a judgment against them.

Seventh: That the Court erred in making an entry of judgment herein in favor of the plaintiff and against the defendants.

WHEREFORE said defendants pray that this their petition to vacate and set aside the decision and judgment made and entered herein and to grant defendants a new trial of this action be granted.

Dated: September 14th, 1922.

CHARLES E. WARREN,
MABEL D. WARREN,
Defendants and Petitioners.

EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Defendants and Petitioners.

Receipt of a copy of the within is hereby admitted this 14th day of September, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 15, 1922. Walter B. Maling, Clerk. [59]

At a stated term, to wit, the November term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 13th day of November, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

Minutes of Court—November 13, 1922—Order Denying Petition for New Trial.

Defendants' petition for a new trial, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said petition for a new trial be and is hereby denied. [60]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Defendants' Bill of Exceptions.

BE IT REMEMBERED that on the 25th day of January, 1922, at the hour of 10 o'clock A. M., at the courtroom of the above-named court, New Post Office and Court House Building, in the city and county of San Francisco, State of California, the above-entitled cause came on for trial before said court. A trial by jury was waived by the parties hereto. The plaintiff appeared by Arthur H. Barendt, Esq., and the defendants appeared by Edwin A. Wilcox, Esq., Messrs. Fry & Jenkins, and Bert Schlesinger, Esq., whereupon the following proceedings were had and testimony taken, viz:

Mr. SCHLESINGER.—If your Honor please: I wish to tender an amendment to the answer. I will state to your Honor very frankly that I was just called into this case quite recently, and I am not certain whether this matter ought to be allowed, or not.

The action is one to recover damages for alleged breach of contract. The plaintiff claims to have purchased land in Santa Clara County, on a contract of purchase, and that he has complied [61] with the terms of the agreement, and that the defendants have rescinded the contract. He seeks to recover first installment of the purchase price, and for damages claimed to have been for money expended by him in the working of the ranch property.

This controversy is in the same form, this identical cause of action,—in fact, the identical complaint

was filed in the Superior Court of Santa Clara County; a demurrer was filed setting up the ground that the complaint failed to state facts sufficient to constitute a cause of action. The case was heard, and the Court sustained the demurrer, and filed a written opinion. The amendment which I now sets up the fact of the pendency of that suit in Santa Clara County, and the action of the Court in sustaining the demurrer, with leave to amend. The facts, as I understand them, are that after the Court sustained the demurrer and granted to plaintiff five days to amend the complaint, a further extension of ten days was given, and before the extension had expired, the plaintiff voluntarily filed a motion for dismissal without prejudice.

I have examined the authorities, including a case your Honor decided, the case of Wolf vs. District Court, in 235 Fed. 72.

The COURT.—What was the case?

Mr. SCHLESINGER.—It was a case in which a plea of *res adjudicata* was raised, the plaintiff in that case having tried his case in the Superior Court, and he was defeated; then he sought to commence his action anew in this tribunal, and your Honor held he was estopped.

The plaintiff is a British subject. He had the right to originally invoke the jurisdiction of this Court, but he did not do so; he submitted himself to the Superior Court.

The COURT.—He submitted himself to that jurisdiction in this case? [62]

Mr. SCHLESINGER.—Yes; I think both courts had jurisdiction. I would like to suggest this: I would like to file the amendment, with leave to submit to your Honor authorities in support of it.

The COURT.—The regular method is to apply for leave to amend. Your right to amend would have to be passed on first.

Mr. SCHLESINGER.—I have served the amendment on counsel. I am not quite clear whether we are entitled to the amendment. I am relying upon this general doctrine: That counsel having selected his form, and having submitted his differences to that court on the identical action, after having received a rebuff there, the demurrer having been sustained, he cannot commence his case anew here. I wish to proffer here a certified copy of the complaint, a certified copy of the demurrer, a certified copy of the order, and a certified copy of the opinion of the Court. (Tr. pp. 1 to 3.)

The following is a true and correct copy of the complaint, demurrer, order and opinion of the Court: [63]

"In the Superior Court of the State of California, in and for the County of Santa Clara.

No. 27,113.

Dept. 1.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

COMPLAINT—DAMAGES—BREACH OF CONTRACT—CONVERSION.

Now comes F. Genn Bromley, the plaintiff in the above-named matter, and complaining of the defendants, Charles E. Warren and Mabel D. Warren, for cause of complaint alleges:

I.

That on the 1st day of December, 1919, plaintiff and defendants entered into an agreement of purchase and sale of certain acreage devoted mainly to the raising of fruit, located on the Homestead Road near Cupertino in the County of Santa Clara, and certain personalty, located on the said acreage property; that attached to this complaint and made a part hereof is a full, true and correct copy of said contract, containing a description of said acreage property by metes and bounds and an itemized statement of said personal property.

Said contract so attached hereto is marked Exhibit "A" and plaintiff pleads said contract in all its terms and conditions as fully as though it were here set forth *in extenso.*

That under the terms of said contract plaintiff was required at the time of the execution thereof to pay, and he did pay, to defendants the sum of Six Thousand ($6,000) Dollars lawful money of the United States, as a first payment on account of the [64] purchase price of said property in said contract described; that the balance of the purchase price, to wit, the sum of $45,000, was by the terms of said contract, to be paid on or before five years from the said first day of December, 1919, with interest at the rate of six (6%) per cent per annum payable annually; that payment of interest and the balance of the principal under said contract, and as security therefor, it was expressly provided, should be made by the defendants retaining title to sixty (60%) per cent of the crop grown on the orchard each year during the life of the contract, and that as said crop was disposed of annually, either in open market or through the California Prune and Apricot Growers' Association, the defendants should receive sixty (60%) per cent of the proceeds of said crop to be—as stated in said contract—"by them credited on unpaid interest and the balance on the principal hereof, as herein agreed."

That it was also provided that plaintiff should farm the premises subject matter of the said contract of purchase and sale, in a first class farmer-like and

orchardist-like manner; prune the trees, remove as far as possible all borers from the roots of trees, remove dead trees and replant the same with apricot or prune trees and irrigate the orchard each year when water was available and eradicate all rodents and pests and perform such other duties as are set forth in said contract as to the nature of which reference is hereby made to said Exhibit "A."

II.

That plaintiff entered into the immediate possession and occupation of said acreage property and the whole thereof, and commenced and continued thereafter during the entire year 1920, to farm said land in a first-class farmer-like and orchardist-like manner; that plaintiff found said orchard in a much [65] rundown and neglected condition; and it was necessary to expend large sums of money in its rehabilitation and plaintiff has expended a sum exceeding $3,825.00 in the rehabilitation of said orchard in so much that the value of said property has been greatly enhanced; and plaintiff invested the sum of $4,000 or thereabouts in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch and all of said tools, machinery and implements were delivered to, and used in the cultivation of, said orchard.

That the year 1920 was one of exceptional drouth and was the fourth successive dry year in the said County of Santa Clara, and there was neither rainfall nor water available for the adequate irrigation of said ranch, nevertheless plaintiff irrigated said acreage to the utmost capacity of the water actu-

ally available and by reason of the care in cultivating and the labor bestowed upon the land and trees on said property, plaintiff succeeded in raising crops the equal of any produced on any similarly situated land devoted to the cultivation of like fruits; and plaintiff has thereby increased the value of said acreage during his tenure thereof.

That in accordance with the terms and conditions of said contract, plaintiff, with the knowledge and consent of defendants, sold all the grapes raised upon said land at a price agreeable to said defendants, and on receipt of the sale price thereof, to wit, on or about the 5th day of November, 1920, paid to them the sum of $313.10, being sixty (60%) per cent of the said sale price of crop of grapes.

That plaintiff delivered to the California Prune and Apricot Growers' Inc., a total of 32,422 pounds of prunes, said delivery being paid for in installments, to wit, on the 27th day [66] of September, 1920, and the 13th day of November, 1920, and at the express request and order of plaintiff, defendants were credited by said California Prune and Apricot Growers' Inc., with sixty (60%) per cent of the said crop, and said incorporation was instructed to pay and paid on the said last mentioned dates to defendants sixty (60%) per cent of the first payment made by it under deliveries and defendants have received and should have applied to the payment under the contract with plaintiff, the sum of $1,567.18 in addition to the $313.10 hereinbefore mentioned; that plaintiff is informed and believes and therefore alleges, that when the said crop of prunes so delivered

to said corporation shall have been paid for in full, defendants will receive a considerable sum, the amount of which plaintiff is unable at this time to estimate further than to allege on his information and belief, that it will be the sum of $1,000 or thereabouts.

That with the knowledge and consent of defendants, plaintiff delivered to the California Co-operative Canneries from the crops raised by him on said fruit ranch 5545 pounds of pears, 816 pounds of free peaches; 175 pounds of cling peaches and 23,158 pounds of apricots and immediately, and in person, notified said California Co-operative Canneries that sixty (60%) per cent of all of said fruit and the proceeds of sale thereof, should be credited to defendants, and such credit was immediately thereupon given by said canneries to said defendants; that the value of said fruit was and is not less than the sum of $5,000 or thereabouts and the sixty (60%) per cent credit in favor of defendants is of the value of $3,000 or thereabouts.

That all of said assignments so made by plaintiff in favor of defendants were accepted by them.

That the total sum which will be realized from the sale [67] of all of said fruit hereinbefore mentioned cannot be stated at this time with more than approximate accuracy; but plaintiff is informed and believes that it will exceed the sum of $5,000; that there was due defendants for interest under said contract on December 1st, 1920, the sum of $2,700 and no more, and the sums collected by defendants and the value of the fruit owned by

defendants and credited to them as hereinbefore set forth, was largely in excess of $2,700; and plaintiff further alleges that but for the labor and skill devoted thereto and the money expended thereon, by him, said ranch would not have yielded crops in such quantity as herein set forth; that at no time prior to December 1st, 1920, was the exact amount ascertainable which should be credited to plaintiff on interest and principal under said contract with defendants, and the exact amount thereof is not yet known either to plaintiff or defendants.

III.

That owing to depressed fruit market conditions in the year 1920 prevailing throughout the County of Santa Clara and elsewhere, which conditions were well known to plaintiff and defendants, no money except as hereinbefore set forth could be realized upon the said crops raised by plaintiff, and plaintiff on or about September 30th, 1920, having placed said ranch property in the temporary care of his foreman, went to San Francisco; that on or about the 9th day of December, 1920, plaintiff was informed that during his said absence and on or about the 1st day of December, 1920, the defendants had entered upon, seized and occupied the house of plaintiff and had appropriated to their own use all the land and all the personal property described in said contract and falsely claimed that plaintiff had broken his contract and that they were entitled to take over and had resumed possession of said [68] real property and all the personalty on said ranch, and that plaintiff had forfeited all right, title and

interest in and to said property and the whole thereof, including the sum of $6,000 in cash paid by plaintiff to defendants on December 1st, 1919, as hereinbefore set forth; together with all moneys received from the sale of fruit and all moneys to be realized hereafter from the sale of fruit regularly assigned to them by plaintiff as hereinbefore set forth, and defendants ever since have and do now retain and hold without right, all of said property.

That plaintiff has fully performed all the terms and conditions of said contract devolving upon him to perform thereunder.

That the defendants have wrongfully breached said contract to the great loss and damage of plaintiff, and plaintiff alleges that his damage is not less in the aggregate than the sum of $12,025; which sum is estimated by plaintiff as follows:

Six thousand dollars paid to defendants under said contract on December 1st, 1919; $3,525 for the labor of plaintiff and his help in the farming of said property, and $2,500 for the enhancement in value of said property due to the labor and care bestowed thereon by plaintiff.

V.

That defendants are husband and wife and in all matters pertaining to said contract immediately subsequent to the execution thereof by defendants, the defendant Charles E. Warren has acted in his own behalf and for and in behalf of his wife and codefendant, Mabel D. Warren.

And as a further, separate and distinct cause of

action, plaintiff complains of defendants and alleges: [69]

I.

Plaintiff here repeats and pleads as fully as though here set forth, all the allegations set forth in the several paragraphs of the first cause of action and further alleges:

II.

That defendants have wrongfully and unlawfully converted to their own use and have deprived plaintiff of the rightful possession of the following personal property of the value herein set forth:

One tractor of the value of	$1575.00
One bean sprayer of the value of	530.00
Hay for feed of the value of	179.63
Lumber of the value of	56.75
One cultivator of the value of	150.00
One disc of the value of	190.00
300 fruit trays of the value of	300.00
150 large boxes of the value of	100.00
Chickens of the value of	100.00
Cook-stove of the value of	20.00
Carpet of the value of	150.00
Riding-horse of the value of	100.00
Grass rug of the value of	27.00
Ice-chest of the value of	30.00
Window screens of the value of	10.00
Brass curtain rods of the value of	15.00
Linoleum of the value of	38.00
Trunk and other personal effects of the value of	200.00

That plaintiff at the time of said wrongful conversion was the owner and entitled to the possession of all of said personal property, and the aggregate value thereof was and is the sum of $3,771.38 or thereabouts.

III.

That demand has been made upon defendants for the return of said personal property; but said property has not, nor has any portion thereof, been returned to plaintiff.

WHEREFORE PLAINTIFF PRAYS judgment against defendants:

(a) For the sum of $6,000, money paid on account of the purchase price of the property in this complaint described. [70]

(b) For the sum of $6,025, for moneys laid out and expended in the cultivation of said ranch and for tools, implements and machinery; and the enhancement in value of said ranch due to the care and labor bestowed thereon by plaintiff.

(c) For such further sum as the Court may find plaintiff is entitled to recover for breach of contract by defendants.

(d) For the return of all the property wrongfully converted to their own use by defendants, or for its value in the sum of $3,771.38.

(e) For costs of suit.

(f) For such other and further relief as may be meet in the premises.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

F. Genn Bromley, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing complaint named; that he has read said complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information and belief and as to them he believes it to be true.

F. GENN BROMLEY.

Subscribed and sworn to before me, this 22d day of March, 1921.

[Seal] JAMES McCUE.

Notary Public in and for the City and County of San Francisco, State of California. [71]

EXHIBIT "A."

THIS AGREEMENT, made and entered into this first day of December, A. D. 1919, by and between Chas. E. Warren and Mabel D. Warren, his wife, the parties of the first part and F. Genn Bromley, the party of the second part;

WITNESSETH: That the said parties of the first part hereby agree to sell to the said party of the second part, and the said party of the second part agrees to buy and pay for on the terms and conditions and subject to the reservations herein provided all of the following described property situate, lying and being in the County of Santa Clara, State of California, and particularly described as follows, to wit:

BEGINNING at a point on the South line of the Homestead Road, formerly known as the Emerson or Young Road, which point is West 5 rods from the Section line between sections 10 and 11, Township Seven (7) South Range 2 West, and is the Northwest corner of the land now or formerly owned by Henrietta Krieg (the late widow of Jacob Smith, deceased) and formerly owned by E. Harrison; thence South along the West line of said lands of Krieg, to the Southwest corner of lands owned by said Krieg; thence at right angles Westerly to the center line of the Cupertino Creek; thence Northerly down said Creek following its meanderings and the center line thereof to the South line of the Homestead, Emerson or Young Road; thence Easterly and along said South side of said Road to the place of beginning; containing 55.55 acres of land, more or less, and being parts of Lots 5 and 6 and part of the Northeast quarter of the Southeast quarter of Section 10, Township 7 South Range 2 West, M. D. B. and M. Saving and except that portion thereof containing 3.94 acres of land, more or less conveyed by said Pedro M. Lusson to the San Jose-Los Gatos Interurban Railway Company, by deed dated January 16, 1905, and recorded January 27, 1905, in the office of said County Recorder in Volume 289 of Deeds, at page 49, Records of Santa Clara, California.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, including all water rights.

Also the personal property on said real property, a list of which is hereby attached and made a part hereof. [72]

2. That the full purchase price for said property to be paid by the said party of the second part to the parties of the first part shall be the sum of Fifty-one Thousand ($51,000) Dollars, lawful money of the United States, of which the sum of Six Thousand ($6,000) Dollars is to be paid upon the execution and delivery of this agreement, the receipt whereof is hereby acknowledged.

3. The balance of said purchase price, to wit: the sum of Forty-five Thousand ($45,000) Dollars shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent net per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, and become a part thereof and thereafter bear interest at the same rate.

4. It is understood and agreed that the party of the second part will take immediate possession of said premises and during the life of this contract, he shall farm said premises in a first-class farmer-like and orchardist-like manner; that he will prune said trees at the proper time each year and so far as is possible remove all borers from the roots of the same; that he will remove all dead trees and as

soon as customary thereafter, replant the same with apricot or prune trees. That he will irrigate the orchard each year when the water is available; he will eradicate all rodents and other pests so far as it is reasonably possible and spray the pear trees each year as often as it is customary so to do.

5. That the party of the second part will pick and gather said fruit when ripe and shall market the same in a first-class manner in accordance with the usual custom of orchardists in Santa Clara Valley. [73]

6. That the parties hereto agreed that the title to sixty (60%) per cent of the crop grown on said orchard each year hereafter during the life of this contract shall remain in the parties of the first part until the same is sold and the proceeds disposed of in the manner provided for in this contract.

7. It is understood and agreed that when said crop is ready for the market, the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in the joint names of the parties of the first part and the party of the second part in the proportion of 60% in the name of the parties of the first part and 40% in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by

them credited on unpaid interest and the balance on the principal hereof, as herein agreed.

8. It is understood and agreed that if said fruit is turned into the California Prune and Apricot Growers Association, it shall be received and paid for in the same proportion and for the same purposes as herein agreed.

9. It is understood and agreed that the parties of the first part may at any time enter upon said premises and inspect the same and that the said party of the second part will keep all fences, buildings, trays and boxes now on said premises in good repair.

10. The party of the second part agrees to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid. [74]

11. The party of the second part shall keep all buildings which are now on, or which may be hereafter erected on said premises, and the trays and boxes insured against loss or damage by fire, to the amount of at least $5,000.00 in some insurance company or companies to be approved by the said parties of the first part, the policies of which insurance shall be made payable, in case of loss, to the said parties of the first part, and shall be delivered to and held by them; in case said party of the second part fails to insure said buildings or pay the premiums thereon, the parties of the first part may place said insurance and pay the premiums and add the same to the amount of princi-

pal hereof and the same shall be immediately due and payable. In case of a fire destroying all or any portion of said buildings, the insurance money shall be used to replace or repair said buildings.

12. It is further agreed by and between the parties hereto that the parties of the first part may mortgage or convey by deed of trust, the said land in a sum not to exceed $15,000, which said encumbrance shall be a lien prior and paramount to any interest therein of the parties of the second part; provided personal notice is given the party of the second part, and that said encumbrance shall not be for a period exceeding the life of this contract, and the said parties of the first part shall pay the interest and principal thereon when due and shall save the party of the second part from loss or embarassment by reason of said loan and that should the principal due hereunder be reduced to the amount of said loan, then the next payment made on principal shall be as liquidation of said loan.

13. That upon the payment of said principal sum, together with all interest, taxes and obligations herein mentioned and according to the terms of this contract, said parties of the [75] first part will execute and deliver to the party of the second part a grant, bargain and sale deed, conveying all of said real property, free and clear of all encumbrances, except as herein provided to be paid by the party of the second part.

14. The parties of the first part will furnish at the time of the delivery of said deed a complete abstract of title to said property brought down to

date, showing merchantable title in the parties of the first part, free of all encumbrances except such as the party of the second part agrees to assume and pay.

15. That in the event said party of the second part fails to pay any of the assessments, insurance premiums, liens or encumbrances on or affecting said property when due, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be immediately due and payable.

16. That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default.

17. That time is and shall be the essence of this contract.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year herein first above written.

CHAS. E. WARREN.
MABEL D. WARREN.
F. GENN BROMLEY. [76]

The following is a list of the personal property mentioned in the foregoing contract:

1 double P. & O. 11-inch plow.
1 spring-tooth cultivator—(2 sections).
1 orchard truck (goose-neck).
1 ten-foot harrow.
1 set work harness.
1 spring-wagon used as trailer.
8 tons of barley hay.
1 bean tractor.
300 boxes.
1500 tree props, more or less.
1 two-h. p. electric motor.
260 feet 10-inch steel riveted pipe.
1 45-foot 8-inch belt.
1 power wood saw.
1 Oliver 8-inch single plow.
1 single cultivator.
1 two-horse wagon (low wheel).
1 grey mare.
1 bay mare.
1 cow.
2 tons cow hay.
10 fruit ladders.
800 trays, more or less.
1 dry fruit grader.
1 twenty h. p. electric motor.
1 No. 5 Krogh pump.
1 dipping plant.

State of California,
County of Santa Clara,—ss.

On this 4th day of December, in the year one thousand nine hundred and nineteen, before me, M. E. Empey, a notary public in and for the said County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Chas. E. Warren, Mabel D. Warren his wife and F. Genn Bromley, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of San Jose, County of Santa Clara, the day and year in this certificate first above written.

M. E. EMPEY,
Notary Public in and for the County of Santa Clara, State of California. [77]

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 27113.

Dept. 1.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

DEMURRER.

Come now the defendants and demur to the complaint of the plaintiff on file herein and for cause of demurrer allege:

I.

That the first alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

II.

That the second alleged cause of action in said complaint stated does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said first alleged cause of action in said complaint stated is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

a. In what the rehabilitation of said orchard consisted in which plaintiff expended the sum of Three Thousand Eight Hundred Twenty-five (3825) Dollars.

b. How or in what manner the plaintiff was damaged by investing the sum of Four Thousand (4000) Dollars, or thereabouts, in the purchase of tools, machinery and implements necessary to the proper farming of said fruit ranch mentioned in the complaint. [78]

c. Whether or not the plaintiff in irrigating said acreage to the utmost capacity of the water

actually available claims to have done more than was required of him to be done by the contract marked Exhibit "A" and attached to the complaint.

d. Whether or not plaintiff interprets said contract as meaning that the payment of the interest and the balance of the purchase price under said contract was to be paid solely out of the sixty per cent (60%) of the crop grown on the orchard each year during the life of the contract.

e. When plaintiff delivered to the California Prune & Apricot Growers, Inc., the prunes alleged in said complaint to have been delivered to it.

f. When the plaintiff delivered to the California Co-operative Canneries the pears and peaches alleged to have been delivered by him to it.

g. Whether or not defendants have entered upon, seized or occupied the house of plaintiff, or have appropriated to their own use any or all of the land or all or any of the said personal property described in said contract, or falsely or at all claim that plaintiff has broken his contract, or that they are entitled to take over, or have resumed possession of said real property, or all or any of the personalty of said ranch, or that plaintiff has forfeited all or any right, title or interest in or to said property or the whole thereof, or any part thereof, including the sum of six thousand (6000) dollars in cash paid by plaintiff to defendants on December 1st, 1919, as in said complaint stated, together with all moneys received from the sale of fruit, or all moneys to be realized hereafter

from the sale of fruit regularly assigned to them by plaintiff as in said complaint set forth, or at all. [79]

h. What sum the defendants have received from the California Co-operative Canneries for the fruit delivered to it by plaintiff.

IV.

That the said first alleged cause of action in said complaint stated is unintelligible for the reasons, and each of them, that it is herein alleged to be uncertain.

V.

That the said first alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is herein alleged to be uncertain.

VI.

That said second alleged cause of action in said complaint stated is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

a. When or where defendants wrongfully and unlawfully, or wrongfully or unlawfully, or at all, converted to their own use the personal property set forth therein;

b. Whether or not any portion of the property set forth in Paragraph Two of said alleged second cause of action is the personal property described in the list attached to Exhibit "A" and made a part of said complaint.

VII.

That said second alleged cause of action is un-

intelligible for the reasons, and each of them, that it is hereinbefore alleged to be uncertain.

VIII.

That said second alleged cause of action in said complaint stated is ambiguous for the reasons, and each of them, that it is hereinabove alleged to be uncertain. [80]

IX.

That several causes of action have been improperly united in this, that a cause of action for breach of contract and damages therefor has been improperly united with a cause of action for the conversion of personal property.

X.

That several causes of action have been improperly united and not separately stated in said second alleged cause of action in this, that a cause of action for breach of contract and damages has been joined and stated with a cause of action for the conversion of personal property.

WHEREFORE defendants pray that plaintiff take nothing and that they be hence dismissed with their costs.

EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

Superior Court of the County of Santa Clara, State of California.

At a session of the Superior Court, held at the courthouse, in the County of Santa Clara, on the 13th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: Hon. J. R. WELCH, Superior Judge; Henry A. Pfiester, Clerk, and George W. Lyle, Sheriff.

27,113.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN et al.,

Defendants.

Demurrer and motion to strike heretofore submitted.

The Court now makes its order sustaining demurrer herein, five days to amend after notice. [81]

In the Superior Court of the State of California, in and for the County of Santa Clara.

Department Number One.—Hon. J. R. WELCH, Judge.

#27,113.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN et al.,

Defendants.

OPINION.

Action for damages for breach of contract for sale and purchase of real estate. So far as necessary to state on disposing of the demurrer herein, plaintiff and defendants on December 1st, 1919, entered into a contract whereby defendants agreed to sell and plaintiff agreed to buy a piece of real estate for $51,000.00, $6,000.00 of which to be paid and which was paid on the execution of the contract, and the balance of $45,000.00 in five years, with interest payable annually at the rate of six per cent.

Plaintiff alleges that on December 1, 1920, there was due on interest to defendant the sum of $2700.00, and on this amount the sum of $1880.28 has been paid in cash.

The contract further provides that the seller shall retain title to sixty per cent of the fruit and products to be grown upon said real estate and that upon the sale of such fruits and products the proceeds thereof are to be applied, first, to the interest then due and the balance upon the principal then unpaid. [82]

It is alleged that defendants now have about $5000.00 worth of fruits so retained by them under said contract which have not been disposed of or sold. Plaintiff alleges that such fruits so retained under the terms of said contract are taken and retained as security for said interest and principal. The Court thinks that this is a correct interpretation of the contract. Notwithstanding that defendants have this security, it does not follow that

defendants have breached their contract by taking possession of the land sold. The interest was to be paid independently of the non sale of the security. Hence on the face of the pleadings plaintiff was in default of the payment of $819.72 in interest on December 1st, 1920. Demurrer sustained.

Dated May 11th, 1921.

J. R. WELCH,
Judge."

The COURT.—An alien may have the right to resort to either one of two tribunals. He has a right to go into the state court. He, like any other suitor, has his right to dismiss at any time; he may for reasons best known to himself, dismiss; that does not preclude him of the right to proceed in any tribunal that is open to him. If you have anything that runs counter to that, I would like to hear it.

Mr. SCHLESINGER.—The Rickey Case in 156 Federal, and the case of Wolf vs. District Court, 235 Fed. 72.

The COURT.—There is no doubt about the principal that if one seeks to have his rights determined in one tribunal, and there is a definitive and binding judgment in the case, he cannot go to another tribunal and be heard on the same matter. He has had his day in court. But these principals have application only in the character of instances I have indicated. It must be a [83] final determination upon the merits. It is true the final determination of the merits may be had upon de-

murrer. But from your statement it never reached that point.

Mr. SCHLESINGER.—It reached the point that the demurrer was sustained, before the judgment was entered, he dismissed his cause without prejudice.

The COURT.—You offer the amendment and I will rule upon it.

Mr. SCHLESINGER.—In the same connection I will also offer in evidence a certified copy of the complaint, likewise duly authenticated, a copy of the demurrer and the order sustaining the same, and the opinion of the lower court.

* * * * * * * * * *

The COURT.—If this is to be pleaded as *res adjudicata,* I do not think the statement made brings it within the doctrine of *res adjudicata.* A demurrer had been sustained, and the parties given a right to amend.

* * * * * * * * * *

The COURT.—The motion to amend will be denied.

Mr. SCHLESINGER.—We take an exception. (Tr., pp. 3 to 5.)

That on the trial of said cause the following testimony was given, viz:

Testimony of Frederick Genn Bromley, in His Own Behalf.

FREDERICK GENN BROMLEY, the plaintiff, called in his own behalf after being duly sworn, testified as follows:

I am a citizen of the United Kingdom of Great

(Testimony of Frederick Genn Bromley.)

Britain and was such at the time of the commencement of this action. I have been in the United States about three years. I came here as an invalid. I was wounded in the war. I came to San Francisco. [84] I visited in San Jose, Santa Clara County, about one year before I met Charles E. Warren and Mabel D. Warren. I was ranching in San Jose. That was my first experience in orcharding. When I met the Warrens I entered into a contract to purchase certain property. This is the contract which I signed. That is my signature.

Mr. BARENDT.—I offer it in evidence, and call your Honor's attention to the fact that it contains at the end a list of personal property.

The COURT.—It will be admitted.

And thereupon it was marked Plaintiff's Exhibit No. 1.

(Witness continuing:) After this contract had been signed and I paid $6,000.00 I took possession of the property on the date stipulated in the contract. I farmed that property thoroughly. I had a diary stating from day to day what I did on the orchard. I cannot remember what I did without consulting the diary. The entries were made by myself each night and they are in my own handwriting. The entries on each date were made in the evening, after the work was done; in the evening of the particular day. It is all in my own handwriting. I irrigated the place. I pruned the trees thoroughly. I did not personally prune the

(Testimony of Frederick Genn Bromley.)

trees, I had an expert orchardist. It was the laborer which I took over when I took the ranch; he was handed over to me. I was to pay this laborer. His name was Okumura; he was a Japanese; he had been in the employ of the Warrens for seven years; he was supposed to know all about it; and I retained him. He did the pruning in the early season; the later pruning was done by another man, whom I consider far more efficient, Savio. I cultivated that ranch in a perfect manner, three furrow, double disking, and a cultivator; both implements I had to buy as those remaining on [85] the ranch when I bought it were broken, and not fit to use. I had to buy a new tractor on the 17th of January, 1920, or else waste the whole of my time. It was impossible to sell the one that was there for anything else but old metal. I got $30 or $40 for it. It was tried two or three times by prospective buyers, but it was no good. Yes, I had to buy many tools that were necessary for working on the place,—hammers, wrenches, picks, spades. The diary showed that I did pruning, disking, ditching and irrigating, the entire work that was necessary. At no time between December 1, 1919, and December 8, 1920, did Mr. or Mrs. Warren ever tell me that I was not cultivating properly, or that I was not irrigating properly, or that I was not pruning properly.

I saw Mr. Warren very frequently during that time. We were on friendly terms; we visited one another's orchards and houses. I made arrange-

(Testimony of Frederick Genn Bromley.)

ments for the sale of my crops when the proper time arrived. It was discussed between Mr. Warren and myself; we both agreed,—it was in his house at dinner one night—we agreed that the prunes should be sold in the usual way, to the Prune Association; and the apricots and other fruits should go to the California Co-operative Association. We worked in conjunction, and agreed on the sales of the little items, such as the grapes, and a few other things, small items; and as far as I could understand we worked harmoniously together; there was no trouble. The fruit has not yet been all paid for. I have not had my final settlement from the Prune and Apricot Growers Association. I think I have had my final settlement with the California Co-operative Canneries, but it was not before December 8, 1920. (Tr. pp. 5 to 17.)

Q. In other words, had you had any payments at all from the California Co-operative Canneries?

A. Advances made [86] against prospective results on the property.

Q. Do you know whether or not Mr. Warren was an officer of that corporation?

A. I have an idea that he was.

(Witness continuing:) The Prune and Apricot Association had not paid in full before December 8, 1920. There were fifty-one acres in that tract. The larger portion is in prunes and apricots and pears. I have not any exact idea of the different acreages. About one-half would be prunes and the balance would be pears. I only had about a

(Testimony of Frederick Genn Bromley.)

half a dozen peach trees, and a few grapes, and a small patch planted in young trees, nothing bearing. When I went on the place the old trees were very bad. I took it for granted they were interplanted with trees that would grow up in five years. (Tr. pp. 17, 18.)

I thoroughly irrigated as soon as water was available. I had to put in some new pipe. I had run a sectional pipe laying from the main pump up to the orchard. I irrigated as far as it was possible to put water out while I was there. I had a conversation with Mr. Warren with reference to the irrigating and we arranged that work; he drew water from the creek after I had stopped pumping. I drew water higher up on the creek; my pump was large, consequently there was very little water for the next man when I was pumping. Mr. Warren came to me about it two or three times. I think he must have been on the orchard every day I was irrigating; he saw how things went on. I had to tell him when I stopped pumping, so he could get water; he pumped at night. I pumped all day, as soon as water was available. (Tr. pp. 18, 19.)

Q. Did you make any irrigation ditches?

A. That had to be done,—and they were thoroughly good irrigating ditches.

(Witness continuing:) I personally operated the tractor for the whole of the time. I had help and all that was necessary; [87] in fact, more than Mr. Warren had, I believe; I had assistants many

(Testimony of Frederick Genn Bromley.)

times. I served upon the California Co-operative Canneries a notice of the rights of Mr. Warren. I acquainted them with the fact that Mr. Warren was entitled to sixty per cent of the crop delivered. I received an acknowledgment of that order. I did the same with the Prune and Apricot Growers Association. When I sold my grapes I shared them with Mr. Warren according to the stipulated amounts. He took sixty per cent. There were no walnuts. (Tr. pp. 19, 20.)

Q. Have you got any receipts from Mr. Warren for any of the moneys you paid him—did you get receipts? A. Yes.

Q. He gave you a receipt for grapes?

A. Yes; he could not give receipts for other moneys because it would be from the association.

(Witness continuing:) Whatever moneys I got prior to December 8, 1920, the proceeds were paid direct to Mr. Warren. In the matter of the grapes, I got cash and paid him and he receipted for it. I learned that the pruning had been improperly done upon that orchard. Expert orchardists and fruit men told me practically the entire season's crop of prunes had been pruned off the trees. Okumura did that. He is the man who was recommended to me by Mr. Warren. He was Mr. Warren's laborer. He was there when I went there. I only had a limited experience as an orchardist; my only experience was here in California on a small ranch I had one year before buying this

(Testimony of Frederick Genn Bromley.)

property; that was thoroughly successful. (Tr. pp. 20, 21.)

Q. Did you pay the first installment of taxes on this property, rather the second installment, some time between the first of 1919, and April or May? [88]

A. No; on that occasion I wrote to the Tax Collector asking if he would hold that over.

Q. You are familiar with the method of paying taxes here in two installments,—the fiscal year is from July 1st to June 30th? A. Yes.

Q. They are payable in two installments?

A. Yes.

Q. When you took possession there would be the second installment coming due in the following spring? A. Yes.

Yes, that applied to my taxes on the prior property. There were no taxes due on this property until the end of November. On that occasion when the demand was made I wrote to the Tax Collector and asked him to hold it over.

The COURT.—Q. The taxes you are speaking of had accrued?

Mr. BARENDT.—Q. The taxes in November you did not pay?

A. No, I asked them to hold them over with interest until they were due on the next occasion, or when it was convenient for me to pay it.

(Witness continuing:) The last time I spoke to Mr. Warren before I learned he had taken possession of the property was the last week in November,

(Testimony of Frederick Genn Bromley.)

November 30th. My conversation with Mr. Warren then was that my foreman was leaving me on that date; that I was looking for another foreman, and should have one before January; it was not necessary to do any more labor on the ranch until that date. All that was necessary was to have someone look after my stock, and Mr. Warren agreed to look after my stock; that as this orchard was not giving me a living income I decided to go into business in the city and run down frequently to my orchard, which would be under the care of a foreman. I so explained to Mr. Warren. I left certain equipment in the house, [89] so that I could run down there and use it, stay there from time to time. Mr. Warren agreed to see that my stock was fed. I had two horses, one cow, some poultry, two dogs. Mr. Warren was going to receive the milk and eggs. He was perfectly willing to feed that stock while I was looking for another foreman to live on the place. He said he would see that the stock was fed in my absence. (Tr. pp. 21, 23.)

Q. When did you first learn that Mr. Warren had taken possession of the ranch?

A. My foreman—

Mr. SCHLESINGER.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) The first intimation I had of Mr. Warren's living in the house came from my

(Testimony of Frederick Genn Bromley.)

foreman in the shape of a letter, asking me if I knew that Mr. Warren was living in the house. It was early in December; my old foreman was still living on the place; his furniture was still there; he had a cottage; he had accommodations there; he wrote me inquiring was I aware that the Warrens were living in my house.

Q. Subsequent to that did you receive any written communication?

A. None whatever. I had no communication with the Warrens after arranging with the Warrens that they should feed my stock.

Q. Did you have any communication with Mr. Warren's attorney subsequent to that?

A. No; that came in after the letter from my foreman.

Q. I show you a letter dated December 9th, 1920, and ask [90] you if that is the letter you received? A. Yes.

Mr. BARENDT.—I offer this letter in evidence for the purpose of showing the date this notice was served.

Mr. SCHLESINGER.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. SCHLESINGER.—Exception.

Mr. BARENDT.—And for a further purpose of showing the conditions upon which a forfeiture is claimed.

The COURT.—Read it.

Mr. BARENDT.—This letter is on the letter-

(Testimony of Frederick Genn Bromley.)

head of Edwin A. Wilcox, Attorney and Counselor, First National Bank Building, San Jose, California.

December 9, 1920.

Mr. F. Genn Bromley,
Claremont Apartments,
Apartment #2,
822 Clayton St.,
San Francisco, Calif.

Dear Sir:

Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of Lots 5 and 6, and part of the Northeast quarter of the Southeast quarter of Section 10, Township 7, South Range 2 West, M. D. B. & M., Santa Clara County, California, and *personally* thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement.

Yours very truly,
(Signed) EDWIN A. WILCOX.

EAW/lk.

Registered—return receipt requested. [91]

Mr. SCHLESINGER.—May I ask if he answered that? A. Personally.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) I did not at any time tell Mr. Warren that I did not intend to return to my ranch. I did not tell anybody that I did not intend to do so. It was impossible to cultivate the one and one-half acres of walnut trees. I left it alone. It had been roughly plowed in the wet season and left in that condition and the furrows were as hard as bricks. I discussed the matter with Mr. Warren; we decided to leave it as it was. (Tr. pp. 23, 25.)

Q. What was the condition of those trees?

A. Entirely dead.

The COURT.—Q. What is the nature of the soil,—adobe? A. Clay.

(Witness continuing:) I know what "adobe" is, I attempted to remove the borers. I had two men working, and myself as well removing borers. I was told by one man who was removing the borers that no borer work had been done on that place at least for nine years.

The COURT.—What is "removing the borers"?

Mr. BARENDT.—It is a white grub that goes into the root of the trees. Its presence is recognized by a substance on the outside of the tree. It rots the tree away.

(Witness continuing:) I removed some of the dead trees. With the other trees I did the very best I could with them. My pump will deliver one thousand gallons a minute. (Tr., pp. 25, 26.)

(Testimony of Frederick Genn Bromley.)

On cross-examination, the witness testified as follows:

I lived in San Jose about a year before I bought this [92] property. Mr. Cruthers went to the Warrens. I did not meet the Warrens until the contract was well on to completion. Mr. Cruthers is a real estate dealer in San Jose. I first entered into possession of the place for the purpose of farming it on December 1st; the day called for in the contract. I had Okumura in my employ at that time helping me to farm the place. He remained with me approximately a few months. I afterwards employed a man by the name of Savio. He remained in my employ to the end of November, 1920. At that time in November he was the only man there. I did not have anybody in December, looking after that property; the only one taking care of it was Mr. Warren; he was going to feed the cattle. (Tr., pp. 26, 27.)

Q. I am asking you whether you had anyone there in December. Between the time Savio left and December 8th did you have anyone there?

A. No.

The COURT.—Q. What time did you say he left?

A. At the end of November.

Q. There was a hiatus of eight days there was nobody there?

A. That is right. Mr. Warren had agreed to feed my cattle.

Mr. SCHLESINGER.—Q. Was there any occu-

(Testimony of Frederick Genn Bromley.)

pant of that house between November 30, 1920, and December 8, 1920, to your knowledge?

A. Not occupying the house.

(Witness continuing:) Savio was still on the place; on and off; he was not working. He had a small cottage. I moved to San Francisco October 9th. On the 30th of November I had a long talk with Mr. Warren. (Tr., p. 28.)

Q. Did you tell him in the middle of November, 1920, you and he being present, that you had no money, that you were discharging the man and were quitting the place,—or words to [93] that effect?

A. Certainly not quitting the place. I had no intention of doing such a thing.

Q. Did you tell him you were discharging the man? A. Yes.

Q. To whom did you have reference to when you said you were discharging the man?

A. Savio.

Q. You had no one else there but Savio.

A. No.

Q. Was anyone in occupancy of that place on December 7, 1920? A. Not to my knowledge.

Q. Was anyone in occupancy of that place at any time between December 1, 1920, and December 8, 1920, to your knowledge?

A. Mr. Warren had access to the house the whole time, but no one was living in the house.

Q. Don't you know that the Warrens were not living there, that they lived on the adjoining property?

(Testimony of Frederick Genn Bromley.)

A. They had the adjoining property.

(Witness continuing:) On December 8, 1920, I had furniture enough for a bachelor to live with; cooking utensils, bed in the bedroom; several things that I had left there, in the way of carpets, many articles; my personal clothing; my wife's personal clothing,—a lot of it; there were such things as would go in the garden, garden furniture. Between October 9, 1920, and December 8, 1920, I had moved away nearly all my furniture. What was necessary for that house I had in my house in San Francisco. I know that a ranch needs care. (Tr., pp. 28, 30.)

Q. Did you on the 4th day of December, 1920, receive a citation from the Labor Commissioner of San Francisco, ordering you to show cause why a warrant should not be issued for your arrest for failure to pay Savio?

Mr. BARENDT.—That is objected to as incompetent, irrelevant [94] and immaterial, and not within the issues.

Mr. SCHLESINGER.—It goes to the question of his good faith, and to the question of abandonment.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) Savio's parting conversation with me was that he regretted having to leave me, but naturally he had a wife and family, and he had to get work and receive his salary. He knew that I could not pay him his salary at that time,

(Testimony of Frederick Genn Bromley.)

but would do so; I even gave him an order on the Prune Growers' Association to receive payment when they advanced me moneys on the crop. Savio knows to-day that immediately I have that money at my disposal he will receive his money, and our relationship is perfectly good. I know the concern of Elmer Brothers, nurserymen in San Jose. On July 26, 1920, I believe I left an order with them for 300 trees. I wanted to comply with my contract concerning replanting. (Tr., pp. 30, 31)

Q. Did you subsequently, on the 20th day of October, 1920, cancel that order, stating to the young lady, who was the bookkeeper there, that you wanted to cancel the order because you no longer had any use for the trees, as you intended to leave the country—answer "yes" or "no."

A. No. If I may be allowed to explain, I cannot give you the exact date, it was young Elmer himself I saw; it was on one of my visits to San Jose; it was after Christmas, I think in January, I told him that I should not need those trees, could he cancel the order.

The COURT.—Q. When were the trees ordered for?

A. As soon as possible; when the proper time for planting came.

Q. At the time when you gave the order?

A. When the rain [95] comes.

Mr. SCHLESINGER.—Q. Didn't you, as a matter of fact, cancel the order for those trees on or about the 20th day of October, 1920?

(Testimony of Frederick Genn Bromley.)

A. I don't think so. I think the order was canceled after Christmas, when I saw young Elmer himself. It was when I visited San Jose, after I had been living in the city here.

Q. Don't you know that you canceled that order after you left San Jose with your family, taking with you your household furniture—wasn't it shortly after that time you canceled the order for the trees? A. After I left San Jose, yes.

(Witness continuing:) I cannot call to mind Mr. Joseph T. Brooks of the California Prune and Apricot Growers' Association, Incorporated, of San Jose. I did not in the fall of 1920 state to Mr. Brooks, at his office, or rather at the office of the California Prune and Apricot Growers' Association, Incorporated, in San Jose, in substance because of my inability to raise certain funds I expected to give up the ranch, and leave for some northern country. I had a few conversations with people in San Jose, officials whom I met, and even meet to-day, and told them the orchard was not a profitable investment; that I meant to go through with my contract, but I should leave the place in the hands of a foreman, visiting it frequently, but would also follow my previous business pursuits. I did not, in the same conversation, or in a subsequent conversation, state to him at his office that I was on my way from the south, that I was bound for the northern part of the State, and that I was very solicitous of securing $100; that I was flat broke. I did not have that talk with Mr. Brooks.

(Testimony of Frederick Genn Bromley.)

Q. Did you at either of those conversations I have indicated, or at any other time? [96]

Mr. BARENDT.—I object to the words "or at any other time."

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

Q. Did you have the first conversation I have interrogated you about in the fall of 1920, at his office in San Jose? A. No.

(Witness continuing:) I know Mr. Wilson very well. He keeps a general merchandise store at Cupertino. Around about October 1, 1920, it was quite possible I had a conversation with him.

Q. Did you at that conversation with Mr. Wilson tell him in substance that the ranch which you had bought from the Warrens was no good, and that while you had funds in other countries, you did not intend to put any more money in the Warren Ranch proposition, or to use any of your funds to take care of the Warren place?

A. The first part of the conversation, I think you are correct. I believe I said to Wilson, as well as to several others, that the ranch was not profitable—was not a profitable investment; that I intended to take care of it to the best of my ability, and carry out my contract to the letter, but I must combine it with my other business pursuits.

Q. You did not have the conversation with him which I have narrated as your having?

A. No—that I would not pay my debts.

(Testimony of Frederick Genn Bromley.)

Q. I will ask you if you know Mr. Ralph Spencer of the Co-operative Canneries? A. Very well.

(Witness continuing:) It is quite possible that I had a conversation with him at the office of the Co-operative Canneries in the month of October, 1920, concerning this ranch. I did not in that conversation state in substance that I had quit the place [97] and had to give it up. (Tr., 31–36.)

Counsel for plaintiff having objected that the line of question was incompetent, irrelevant and immaterial, it appearing that possession of the property had been taken for the reasons set out in the notice and that no abandonment had been pleaded, the following colloquy took place:

The COURT.—I am looking for the specific features of the answer upon which the defendants rely as to the grounds of their undertaking to cancel the contract. Where is that to be found?

Mr. SCHLESINGER.—We claim, in substance, in Paragraph 4, where the charge is of having entered that orchard during his absence. We want to show that he intended to, and actually did abandon that property; and we had the right to reenter the property for our own protection, and not to his damage; that is the purpose of this. That question, and his willingness and good faith in things of this character are also admissible. Here is the situation: This man, after he made this contract, went out and created debts and borrowed money.

The COURT.—Where is there anything in these

pleadings to raise an issue which would enable you to introduce evidence of this character?

Mr. SCHLESINGER.—Paragraph 2, denying that he farmed the land in a farmer-like manner. And Paragraph 3, answering Paragraph 4 of the complaint, we say that the plaintiff did not place in the temporary care of a competent foreman. We admit that we did take possession of the property on December 8, 1920, because he had breached his contract, and all his rights had terminated; we further say that we entered, denying that we entered without legal right. That was an orchard which needs constant [98] care; we certainly have a right to protect the property.

The COURT.—You will have a hard time undertaking to breach this contract upon any ground that is not alleged here.

Mr. SCHLESINGER.—This place was left alone. What were we to do? Allow it to go to rack and ruin, and not take care of it?

The COURT.—Confine yourself to the issues.

Mr. SCHLESINGER.—I contend that under Paragraph 3 of the answer in this case we are entitled to show the intention upon the part of this man to abandon that place; we can show that by his declarations to abandon, in connection with the fact that he said to these people he intended to abandon.

The COURT.—If it tends to show anything that would give you a right of cancellation of the contract and re-entry upon the premises. The trouble

is, you have not alleged,—at least I cannot find it, —that he ever informed you that he was going to abandon the place.

Mr. SCHLESINGER.—The contract gives us the right to enter for the purposes of inspection. Under the contract, we claim there is implied, when, as in this case, two men enter into a contract, and a small portion of the purchase price is paid down, and that out of the crops to be gathered 60 per cent is to go on the purchase price and 40 per cent to be retained by the buyer, in that kind of a case where the evidence would tend to show that the vendee abandoned the place, and announces his intention to abandon, that we have a perfect right to go in there and work it in a farmer-like way.

The COURT.—If it does not bear pertinently upon the issues, I will have to disregard it.

Mr. BARENDT.—That is objected to. They have stated [99] specifically in their notice the grounds upon which they have terminated this contract; they cannot change that now.

The COURT.—That gives rise to estoppel *in pais,* if that is the fact.

Mr. SCHLESINGER.—It says "owing to your failure to perform many of the terms and conditions on your part." It does not state specifically what the breaches were. We entered the premises before the notice was given, and, as a matter of fact, found that place abandoned; there was no one there; we are substantially interested in the prop-

(Testimony of Frederick Genn Bromley.)

erty. What were we to do? There was nobody there. Where is this man's damage,—I cannot see any. We did not rescind the contract. I will ask that the question be answered.

Mr. BARENDT.—I renew my objection.

The COURT.—Read the question.

(Last question read by Reporter.)

A. No.

The COURT.—Did you state anything of that kind? (Tr., pp. 36, 37, 38.)

(Witness continuing:) I made the general remark to many people that I was taking up my business pursuits, and that I was carrying the ranch on under a foreman, and I was visiting it, but I was carrying out my contract on the ranch. I do not think any taxes on that land were due from me until about the end of November. (Tr., pp. 38, 39.)

Q. Did you pay the taxes on that land, the first installment, for 1920?

The COURT.—The taxes which were due on November, 1920.

A. No. I wrote to the Tax Collector asking him to hold them over until the next installment was due, when was the usual time to pay [100] it.

Mr. SCHLESINGER.—Q. Don't you know that Mr. Warren paid that installment of taxes, after you had failed to pay it? A. No.

(Witness continuing:) I don't think I have a copy of the letter I sent the Tax Collector. I cannot tell without reference to the correspondence between myself and the California Canneries

(Testimony of Frederick Genn Bromley.)

whether the value of the fruit delivered to the California Canneries and the amount received from that delivery instead of being $5,000 was $894.07. The California Canneries advised the fruit-holders last October what the final settlement would amount to. It is co-operative. Every member of the association puts in his fruit; after it is all sold, the net profits are divided *pro rata* amongst those who put their fruit into the association.

The COURT.—Q. Without reference to the quantities?

A. No; they are all graded and all sorted out, and the quantities arrived at. When everything is paid, then the net proceeds are divided *pro rata* amongst the members.

(Witness continuing:) It is a co-operative association,—[101] they market the fruit, and after taking out the overhead, they divide the net profits amongst those in accordance with the amount of fruit they surrender, and that would not be known until their sales are finished. In October last, I think, was the final statement from the Co-operative Canneries as to what the proceeds were. (Tr., pp. 39, 40.)

Q. October, 1921? A. This last October.

Q. On their operations for the fruit of 1920?

A. Yes. The Prune Growers' Association have not done so yet.

Q. For the crop of 1920?

A. For the crop of 1920.

Mr. SCHLESINGER.—Where did you get these

(Testimony of Frederick Genn Bromley.)

figures from, that the value of the fruit delivered to the California Canneries was $5,000?

A. I cannot tell you. I have no recollection.

Q. Do you know how much money was due for interest on this contract on December 1, 1920?

A. To my mind, nothing was due. It was due, subject to the final maturing of the crops, and that was where interest and capital were both to be paid from.

Mr. SCHLESINGER.—Q. Assuming there was interest due December 1, 1920, in the sum of $2,700, that is figuring interest at the rate of 6 per cent, according to the contract, and allowing for your share of the fruit according to the contract, is it not a fact that there was due on December 1, 1920, the sum of $2,700.00 on interest alone?

Mr. BARENDT.—That is objected to; it is calling for the opinion of the witness and calls for him to interpret the contract.

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception. [102]

Q. Did you pay any interest outside of the credit being allowed for the fruit which was sold to the Canneries, have you paid any interest?

The COURT.—Outside of that which would be derived from the receipt of the fruit?

A. No, unless the moneys received from the sale of the grapes are paid against the interest accruing.

The COURT.—Q. It would, under the contract, be credited first to interest?

(Testimony of Frederick Genn Bromley.)

A. Mr. Warren has received moneys from the sale of grapes.

(Witness continuing:) I disced the orchard.

Q. (Mr. SCHLESINGER.) Did you plow any of that orchard,—yes or no? A. Yes.

Q. What do you mean? Do you make a distinction between "discing the orchard," and "plowing the orchard"?

A. The flat lands were all double-disced, worked with the disc and cultivator, and the banks where it was impossible to pull a disc were plowed with a horse plow. (Tr., pp. 40–42.)

The witness, by consent of the Court, was then recalled for further direct examination.

Mr. BARENDT.—Q. Mr. Bromley, in your complaint you have alleged that you expended $3,825 for labor during the year you were on the ranch: How did you arrive at that figure?

A. $1,300 paid out for hired labor; $2,500 for my own labor, a total of $3,800.

Q. In the second cause of action you have alleged that there was taken from you a number of items, a number of implements, etc: One tractor, of the value of $1,575: What did you pay for the tractor; in other words, was that the contract price? [103]

$500 is the amount I paid when making the contract.

The COURT.—Q. You mean you paid that down?

A. Yes; I paid that down.

The COURT.—What was the contract price, the

(Testimony of Frederick Genn Bromley.)

whole price? Is the figure set down in your complaint?

Mr. BARENDT.—$1,575.

The WITNESS.—$500 of which I paid, and the balance to be paid for.

Mr. BARENDT.—Q. Is that the tractor bill, for $1,575 (showing)? A. Yes.

Q. (Reading.) "Credit, $500, cash"? A. Yes.

Q. Do you know what became of that tractor?

A. It was reported to me that Mr. Warren still has it; I think so.

Mr. BARENDT.—Q. (Reading.) One bean sprayer: How much did you pay for that?

The COURT.—Q. A sprayer for fruit trees?

A. Yes. I bought that for $530.

Mr. BARENDT.—I offer this bill for one Fageol Tractor in evidence.

(Bill marked: "Plaintiff's Exhibit No. 3.")

Mr. BARENDT.—I also offer the bill for the bean sprayer in evidence.

(The document was here marked: "Plaintiff's Exhibit No. 4.")

(Witness continuing:) There is a credit of $250 on the bean sprayer. It has been returned to the Bean Spray Pump Company. I asked them to take it away. They asked me, was I prepared to pay in full. I said "No; will you kindly take possession of it, re-sell it, and charge me with the difference." I cannot tell you exactly when it was, but it was last year, after I had left the [104] ranch, while Mr. Warren was in possession. The value of the

(Testimony of Frederick Genn Bromley.)

hay was $179.63, not paid for. It was delivered the end of November and December. Part of it was delivered in December. I got that to feed my cattle while I was still away. I paid for lumber $56.75. I left it on the ranch. One cultivator $150.00, that I believe is still on the ranch. I paid $150.00 for it. I paid $190 in cash for the disc. Three hundred fruit trays, $300.00. I left those on the ranch. 150 large boxes, I charge $100.00 for those. I left those on the ranch.

The COURT.—Q. What did you pay for those boxes?

A. I made them, mostly. I bought the lumber and made the boxes.

(Witness continuing:) I charge $100 for the whole lot of chickens. One cook stove $20.00, that I left on the ranch. Brussels Carpet $150, that was left on the ranch. I left one riding horse there, and put a value of $100 on it. (Tr., pp. 42–46.)

The COURT.—Q. Do you know if the defendants had appropriated that property and made use of it?

Mr. SCHLESINGER.—He charges that in his complaint. A. I cannot tell you.

The COURT.—Q. They never turned it over to you?

A. They have appropriated it; whether they used it, I don't know.

(Witness continuing:) I valued the grass rug at $27.00. I paid a great deal more for it, I believe. Ice chest $30.00. I bought that in San Jose. I think it is valued at more than that. I left it

(Testimony of Frederick Genn Bromley.)

there. Wire window screens $10.00. Brass curtain rods, $15.00. I left those there. I paid more than that for them. Linoleum $38.00, which cost me more than that figure. I left it there. I had sufficient down there; I [105] could take my wife and little girl down there; bed, sheets, blankets, a chair, wash-stand; that is all, I think, in the bedroom. I left cooking utensils, cook-stove, ice-chest, plates and cups and saucers, knives and forks, and sufficient crockery to eat with. I left lots of personal clothing of my own and my wife's; my military uniform. I have not a list of how many shirts and pajamas, and undervests, but there is quite a quantity of it. My military uniform, and my military kit is there, my working clothes for the labor, my boots, plenty of them, cover-alls. Some of my wife's clothes were left there, dresses, millinery, underwear and her riding clothes. (Tr., pp. 46–48.)

Mr. BARENDT.—Q. You have put down $200 for personal effects; what did those uniforms cost you? A. 150 sovereigns, sterling.

Q. That would be about $450? A. Yes.

Q. Did you leave a baby-buggy there? A. Yes.

Q. Those things were all left there by you?

A. Yes.

Q. Did you leave a trunk there?

A. Two, if not three.

Q. You have put together all those dresses, those uniforms, and your trunk, and your bed-room furniture at $200?

(Testimony of Frederick Genn Bromley.)

A. Yes; it is a very modest figure. (Tr., pp. 48–49.)

On further cross-examination said witness testified as follows:

I bought that tractor from Artana-Geoffroy Company on conditional sale. Not to my knowledge was the tractor retaken by the seller from whom I had agreed to buy it. I don't know it [106] to be the fact. I have seen Mr. Artana since; he did not mention it to me; he gave me a different version of it. (Tr., pp. 49, 50.)

Mr. SCHLESINGER.—Q. You say you don't know whether it was retaken by the people from whom you bought it. You say you have no knowledge on that subject: That is right? A. Yes.

Q. When you swore to this complaint, charging us with having taken it from you, you did not know what the fact was?

A. It was on the ranch, as far as I know.

(Witness continuing:) I bought the bean sprayer from the sprayer company. I paid part cash, and the rest of the payments were to be made later. I asked them to take it; when they took delivery of it, they told me in the difference in time they had sent it, and had taken it away, it had every appearance of being used. At my request they took possession of that article. I left the ranch on October 7th, taking what household furniture was necessary to furnish my flat in this city. I cannot say exactly how much there was on the date that I left but part of the quantity I had contracted for, and quite suf-

(Testimony of Frederick Genn Bromley.)

ficient for feeding the stock. I was not short of feed. It was all left in good condition. I was on the place between the time I left and December 8th, when the defendants re-entered the place. I cannot tell you how many times but it was several times just for visits. I was there a few times before the Warrens took possession. It must have been around November 30th that I was there. (Tr. pp. 50–52.)

The COURT.—Mr. Bromley, he is talking about the period between December 1st and December 8th, when they retook possession of this property.

Q. Between the first of December and the eighth of December how often were you there? [107]

A. I don't think I was there from November 30th.

Q. You were there between October 7th and December 1st? A. Surely.

Mr. SCHLESINGER.—Q. Were you there during the month of November at all? A. Yes.

Q. How many times; were you there more than two?

A. I should say yes, because it was rarely a week I missed without going down.

Q. Were you there at all during the month of November? A. Yes.

Q. Were you there during the latter part of November? A. Yes.

Q. Was there any hay there at that time?

A. Yes; my stock was looked after.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) Savio was taking care of the stock at that time. When my man left there in the early part of December there was hay there. I was not there after the first of December. I had a horse and a cow. They required feeding. I had hay there for that purpose. According to my knowledge Mr. Warren fed the stock after my man left; he arranged with me to feed the stock. I had arranged with Mr. Warren to go into that place and take care of my stock. I made no arrangements for the care of the ranch; there was nothing whatever to do; no work necessary to be done on the ranch. (Tr., pp. 52–54.)

Q. Mr. Bromley, do you testify that it was your intention that nobody should farm that place, and look after it between October and February, at which time you intended returning?

A. There was work done after October. There was no work necessary to be done from the 1st of December until the end of [108] January.

Q. What work was done during the month of October, to your knowledge?

A. The ranch was cleaned up and all the scrub burned.

Q. What work was done during the month of November? A. The same.

Q. What work did you expect to do there and have done during December and February?

A. There was nothing to do.

Q. What did you ask Mr. Warren to do for you?

A. Feed my cattle.

(Testimony of Frederick Genn Bromley.)

Q. And only feed your cattle?

A. That is all.

Q. You had no man in charge of that place during that time? A. No.

The COURT.—Q. They were to milk the cows?

A. Yes.

Q. Were the cows giving milk?

A. Yes,—one cow.

(Witness continuing:) No it was not my intention that the ranch should be uncared for between the first of December and February. I expected to have a foreman in before the first of February; it was my intention to do so; in fact, I would have a foreman there as soon as I could have found a suitable man. I had let my foreman go. I do not know that ranches in that country situated in that locality require care between the months of December and February. I am not an expert orchardist. The irrigating season in that locality was when the creek had water in it sufficient to start the pumps. I don't think there were any rains between December and February. There was no water in that creek before March. (Tr., pp. 54, 55.) [109]

Q. Were you there between December and February? A. There was no need to be there.

Q. Were you there, after relinquishing the place?

A. When Warren took possession of the orchard I washed my hands of it, and told him so.

Q. Regarding those items: There was a tractor, was there not, belonging to Mr. Warren?

A. When I bought the place, yes.

(Testimony of Frederick Genn Bromley.)

Q. Did you sell it? A. Yes.

Q. You kept the money?

A. Yes, surely. I sold it and Mr. Warren knew it was useless as a tractor; in fact, I doubt whether it was useful as old iron.

(Witness continuing:) The riding-horse was there at the end of November. It was not only a riding-horse; it was used for a work horse too; in fact, my small ranch was worked entirely with that horse for one year, and it did considerable work on this orchard, as well as hauling tile, and worked on the farm wagon, in harness with the colt. I have never made a demand upon the Warrens for any of these articles of personal property. (Tr., pp. 55, 56.)

Q. Have you ever made a demand upon the Warrens at any time to allow you to perform your contract?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Yes. Where one party to a contract assumes to cancel it, the other party has one of two remedies,—that is, in the event he has a right. He may either sue for specific performance, or he may acquiesce in the cancellation, and sue for damages. This action proceeds on the latter ground; [110] acquiesce in the rescission and suit for damages.

Mr. SCHLESINGER.—There can be no rescission while the man remains in default.

The COURT.—I understand what you mean.

(Testimony of Frederick Genn Bromley.)

Mr. SCHLESINGER.—Where a buyer is in default he has obligations.

The COURT.—That is a question of law. This action is brought upon the theory that he acquiesced in the rescission or cancellation, and is suing for damages.

Mr. SCHLESINGER.—And that he was not in default.

The COURT.—And that he was not in default.

Mr. SCHLESINGER.—Q. The Warrens reentered that ranch on the 8th day of December, 1920. You know that to be the fact?

The COURT.—He says he was told so.

Mr. SCHLESINGER.—Q. You know there was no one in charge when they made that entry: That you know to be so? A. No one in charge.

Q. Do you know what they have done on that ranch since you left it?

Mr. BARENDT.—Objected to as incompetent, irrelevant, and immaterial.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

The COURT.—He is not concerned with what they have done there since they went there.

Mr. SCHLESINGER.—Q. Do you know what they did on entering that ranch? What the first thing they did with reference to the care of the trees?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial. [111]

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) I remained in possession of that ranch either by myself or foreman until about the first day of December. I said the work was necessary to commence the first of February. I believe I led Mr. Warren to understand that as soon as I could find a suitable foreman he would be installed,—certainly by the end of January or the 1st of February. I considered that the first of February it would be necessary to commence work. I know Mr. Frank King of San Jose. (Tr.., pp. 56–58.)

Mr. SCHLESINGER.—Q. Didn't you, on or about January 7, 1921, have a conversation with Mr. King, in San Jose, and the persons present being yourself and Mr. King; didn't you in January 7, 1921, or thereabouts, at the office of Mr. Wilcox have a conversation with Mr. King, Mr. Wilcox, and yourself and Mr. King being present, —answer "yes" or "no."

A. I remember having a conversation at Mr. Wilcox's office; Mr. King is a friend of mine; I had many conversations with King, both on business and friendship.

Q. Didn't you in this conversation, at the time and place I have indicated, and within the hearing of the persons named, state, in effect, "I have quit the ranch," and "I would not take back the place at any price," yes or no?

* * * * * * * * * *

The COURT.—It is entirely immaterial, it was after the ranch had been taken by the other party.

(Testimony of Frederick Genn Bromley.)

Mr. SCHLESINGER.—We take an exception. It also bears upon the question of damages. (Tr., pp. 59, 60.) [112]

(Witness continuing:) During that year I was there I pruned all the trees in the orchard that needed pruning. I cannot tell you how many trees there were. I never checked up how many prune, or how many apricot, or how many pear trees there were. It was never specified in the contract when I bought the ranch. There was approximately one and one-half acres planted in yellow walnuts. I think I have already told you that I did not cultivate or irrigate the walnut trees. It was impossible. I did not know that the walnut trees died through lack of cultivation or irrigation, or both. I have my own views on the matter. I don't agree with yours. I removed dead trees as the contract provided. I cannot tell you how many; there was a large number of them. I kept a diary of the things that I did on that ranch. There is no entry in the diaries as to the number of dead trees I removed; there are entries "removing dead trees." After removing the dead trees I did not replant any trees. I ordered trees for replanting and cancelled the order. I cannot remember the date, but I believe my conversation with Mr. Elmer was after Christmas. I don't know how many trees should have been replanted in lieu of the dead ones, but I bought 300 trees, and that is the order I had cancelled. I believe I ordered those trees from Elmer Brothers on July 26, 1920. I cannot

(Testimony of Frederick Genn Bromley.)

remember whether I cancelled the order on the 20th of October, 1920. (Tr., pp. 60–62.)

Q. Don't you know, Mr. Bromley, that you only irrigated about one-half of the orchard?

A. No, I don't know that.

Q. Don't you know that as a result of your failure to irrigate the entire ranch, that there was a loss in trees to the amount of about $1,500?

A. I do not agree with you.

Q. You don't know anything about that?

A. I don't agree with you. [113]

Q. What is the fact? Have you any knowledege of the fact?

A. Yes. The whole of the upper part of the orchard was irrigated thoroughly. I understand that the water broke over the banks and partially flooded the lower flat; by the time I had worked up to that bank there was no water to be drawn out of the creek. That means I irrigated thoroughly as long as water was available.

Q. There is another part of the contract which says you should eradicate rodents; there were rodents upon the place, as there are upon other places? A. In abundance.

Q. Did you eradicate any of the rodents?

A. As many as possible.

Q. Don't you know that the gophers killed some 73 trees, girdling the trees?

A. I believe that applied to every other ranch in the vicinity.

(Testimony of Frederick Genn Bromley.)

The COURT.—Q. Do you know anything about it?

A. Yes, they did; the exact number I cannot say, but they girdled many treas. (Tr., pp. 62–63.)

(Witness continuing:) I sprayed the pear trees twice during the season, on the date of February 10, 1920, "spraying pears, from 7 to 12 and 1 to 5:30." Again spraying on the following day from 9 to 12, and in the afternoon from 1 to 5. Again on the following day from 7 to 5, spraying pears all the time. That was possibly the first spraying operation. The second took place when the fruit was just forming, which is customary, I believe, and takes some range of time.

The COURT.—Q. What date?

A. Later in the season.

(Witness continuing:) Under date of May 18th, spraying pears from 8 to 6, with arsenic of lead. Again on the following day from 8 in the morning until noon. That finished it. [114] I did not spray after that.

Mr. BARENDT.—Q. May I ask the witness to read the whole of the entry on that date?

A. (Reading:) "Spraying pears from 8 in the morning to 6:30 in the evening. Henry does his chores, and spraying pears.

Mr. BARENDT.—Q. Who is "Henry"?

A. Henry Savio.

Mr. SCHLESINGER.—Q. In the month of November, 1920, did you have a conversation with both Mrs. and Mr. Warren, in the city of San Jose,

(Testimony of Frederick Genn Bromley.)

at their home in Cupertino, you being present, in which you said in substance and effect that you had no money to pay the balance of unpaid interest due on December 1, 1920, or to care for the property; that you were going to discharge your man because you could not pay his wages, and you owed him a large sum of money, and that you would not do anything on the farm until February; if defendants wanted the ranch cared for, they must do it themselves,—or words to that effect?

A. Yes. This probably transpired at the same time, —that I was owing my man his wages; that I could not pay him, he would be paid later on; he was leaving me to find work. I also told them that all the work necessary to be done was finished up to the end of November, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, and also provide funds for the overhead of that orchard, which was,—I believe I used the expression to Mr. Warren,—that it was a "white elephant." I used that expression to other people as well. I also told Mr. Warren that I would be running up and down frequently to see that the work on the ranch was properly carried on, and I think I mentioned at the same time, that I should probably ask Mr. Warren to look after my stock during the time I was looking for a new foreman, and I again repeated that [115] on the 30th day of November, to which he agreed. Then I think there was some other conversation which took place at that time,

(Testimony of Frederick Genn Bromley.)

which you have not mentioned; Mr. Warren got very heated, and one thing and another—

The COURT.—(Intg.) State what it was.

A. I cannot recollect, but I think it was at that conversation that I mentioned that it was rather hard lines that we had parted with our crops and had done our work, but were not obtaining payments for the fruits. Warren said: "We are all in the same box; we have simply to put our shoulders to the wheel and pull through the best we can." I think that was at the same time.

Mr. SCHLESINGER.—Q. Did you not on that occasion apply to the Warrens for a loan?

A. No.

Q. You recollect that you did ask them to look after the stock, and not the ranch?

A. Exactly.

Q. You thought the stock was of much greater value than the ranch?

A. The stock needs feeding.

Q. As a matter of fact, did you have sufficient money to care for that property?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception. It goes to his ability to carry out the contract. (Tr., pp. 63–66.)

The Court permitted an inquiry into the indebtedness of the plaintiff over the objection of his counsel, stating that he would admit it for the sole

(Testimony of Frederick Genn Bromley.)

purpose of its possible bearing on the question of damages. (Tr., p. 69.)

Q. Did you owe the Bank of San Jose at that time $1,500, [116] or thereabouts?

A. Yes; it was amply covered by a provision for payments.

Q. Have you ever paid it? A. Not yet.

Q. Did you owe the Garden City Bank at that time [117] $2,350, and interest from June 30, 1920?

A. The same answer applies to that.

Q. Have you ever paid it? A. No.

Q. Did you owe the Bean Spray Pump Company $580?

A. The balance of the amount due on the sprayer, yes, I did owe that.

Q. Did you owe that as a balance due them?

A. Yes.

Q. Did you owe for the tractor $360?

A. In the same way.

Q. Didn't you owe for groceries $185?

A. The same answer applies.

Q. Didn't you owe Wilson for groceries at Cupertino $400 on December 9, 1920, and don't you still owe it to him?

A. That I don't know anything about.

Q. What do you owe him on that.

A. I owed Mr. Wilson, I believe, in the fall; whether he received it I cannot tell you. I am waiting for advice from the Prune Growers Associa-

(Testimony of Frederick Genn Bromley.)

tion as to what arrangement was made with that account.

Q. Did you owe the butcher $50?

A. Yes.

Q. Did you owe the man for hay, $279?

A. Yes.

Q. Did you owe the Madison Furniture Company $225?

A. I don't know about that amount. I owed them a little.

Q. Did you owe Trunkler Dorman $130 for merchandise?

A. A small amount, but not $130.

Q. Did you owe the City Store $185 for groceries?

A. No; that is a cultivator; it includes tools.

Q. Did you owe the Railroad Company for ties $10, or thereabouts?

A. Thereabouts. As a matter of fact it is half of that amount. [118]

Q. Did you owe the Sloane Furniture Company?

A. I did, at that time.

Q. $351.69?

A. I think I did, at that time.

Q. You owed Sherman Clay for a piano which was taken away?

A. It was not taken away. I owed them a balance of payment.

The COURT.—Q. Had you received any returns that year at all on your crop?

A. No. Small advances were made on the base payment.

(Testimony of Frederick Genn Bromley.)

Q. You never had received any account from them? A. No, not yet.

Q. Have you inquired from the two canneries as to the values of the crops?

A. Several times.

Mr. SCHLESINGER.—Q. You verified this complaint, did you not? You swore this complaint, and swore to it?

A. Yes. No man knows the value of those crops, not even to-day. The Prune Growers Association for the crop of 1920,—nobody knows what it will realize, net.

Q. Let me call your attention to this paragraph of this complaint. On page 4, line 28, you have made this allegation:

> "That with the knowledge and consent of defendants plaintiff delivered to the California Co-operative Canneries from the crops raised by him on said fruit ranch and at various times during the late summer and early fall of the year 1920, 5545 pounds of pears, 816 pounds of free peaches; 170 pounds of cling peaches and 23,158 pounds of apricots, and immediately and in person notified said California Co-operative Canneries that sixty per cent of all of said fruit and the proceeds of sale thereof belonging to and should be credited to defendants, and such credit was immediately thereupon given by said canneries to said defendants; [119] that the value of all of said fruit was and is not less than the

(Testimony of Frederick Genn Bromley.)

sum of $5,000, and the said sixty per cent credit thereof to be applied by defendants to the balance of said principal and unpaid interest under said contract is the sum of $3,000."

Q. Where did you get those figures from?

A. The approximate values of the fruit given out and expected at that time when the market was very much higher than it was towards the end of the year. You know perhaps, as well as I do, —I do not know very much about it, but all that year prices were falling. At the time we got our final statement we got very much less than we anticipated.

Q. You filed this complaint in this court on the 27th day of June, 1921?

A. If you have it in front of you, I presume that is correct.

Q. You say therein: "And the said sixty per cent credit thereof to be applied by defendants to the balance of said principal and unpaid interest under said contract is the sum of $3,000." Did you have any figures in your possession from the Canneries Company to justify that statement?

A. Those figures are only made providing the fruit realizes the value as according to the market report of prices on that date. You cannot judge that with the fluctuation of fruit prices. (Tr., pp. 70–73.)

(Testimony of Frederick Genn Bromley.)

On redirect examination the witness testified as follows:

I set traps to eradicate gophers and other rodents on the orchard. I had from four to six dozen traps constantly at work, put poison in the holes. I spent days, and had two boys for two or three weeks shooting squirrels, and poisoning them. I did everything that was possible. The traps were examined and reset [120] every day, every morning.

Q. In reference to this tractor; there is a tractor mentioned in that contract, is there not?

A. Yes.

Q. That tractor is valued at $1,500, is it not, by Mr. Warren?

A. I think $1,000,—I am not sure.

Q. At any rate, Mr. Warren knew when you sold that tractor? A. Yes.

Q. Did he know it was sold to a junkman?

A. Yes.

Q. How much did you get for it?

A. Between $30 and $40.

Q. That was an old tractor? A. Yes.

Q. That broke down when?

A. The first day it was used.

Q. When did you sell it?

A. About six or seven months afterwards.

Q. I find an entry in your diary that you paid for the Fageol tractor on the 17th of January, 1920?

A. Yes; if it is in the diary, it is correct.

Q. Then you sold the old tractor? A. Yes.

(Testimony of Frederick Genn Bromley.)

(Witness continuing:) After the first of October, when I came to San Francisco, I visited the ranch repeatedly to see that everything was going on satisfactorily. Savio remained there until the end of November; he worked until the end of November. After that he was still on the ranch until he removed his furniture out of his house, about a week or ten days after that date. (Tr., pp. 73–75.)

Mr. BARENDT.—Q. You swore to this complaint in June. Is it a fact that on October 10, 1921, you received your first statement from the California Canneries?

A. The final statement, I think. [121]

Q. Didn't you also receive some time prior to that a statement from the Prune and Apricot Association, saying there would be later a payment to you?

A. Yes.

Mr. BARENDT.—It goes to show that no one knows what they are getting for fruit.

The COURT.—Q. Does this statement of the Prune and Apricot Growers Association of November, 1921, disclose the amount that they paid over to the defendants of their 60 per cent?

A. The statement was made during the year.

Q. How much?

Mr. BARENDT.—The total payments are in cash, $2,064, that the defendants received prior to their entry.

The WITNESS.—That is not the final statement. Those are advances.

(Testimony of Frederick Genn Bromley.)

The COURT.—I am asking you if their statement did not disclose how much advances had been received by the defendants from their 60 per cent of the crop. You say over $2,000?

Mr. BARENDT.—Yes; from all the crops together, over $2,000.

The COURT.—Prior to the time they re-entered?

Mr. BARENDT.—Yes.

The COURT.—How much was the annual interest?

Mr. BARENDT.—$2,700. It is admitted in the answer, your Honor. In the answer they give a table of the moneys they received. The last date is November 30, 1920; up to that time they received $2,064; therefore there was only $636 of interest approximately due and owing.

The COURT.—Did that close out the account of that year's crop?

Mr. BARENDT.—There was more to come. There were still [122] accounts from the Prune and Apricot Growers Association, as well as accounts from the California Canneries. When those figures were actually received, then Mr. Warren's right accrued to come and say: "Mr. Bromley, I have only received $2,500; there is further interest due." That was the only time, and the first time they had a right to say, "If you do not pay up, we have a right to re-enter."

Mr. SCHLESINGER.—Q. Did you receive statements of account from the Canneries Company in this form?

(Testimony of Frederick Genn Bromley.)

A. No, I have not seen this.

Q. Did you receive any statements from the Canneries Company? A. I think not.

Q. Or from the Prune and Apricot Growers Association?

A. I think I had a statement from the California Co-operative but not from the Prune Growers Association, because they will send out a statement when the account is closed; they have not yet closed.

Q. The only payments you have made to the defendants here on this $55,000 purchase was your first payment, outside of any crops, to which they would have been entitled from the fruit contracts with the Canneries: Is that right?

A. That is where their payments were to come from.

The COURT.—The contract does not call for any money payments until the end of five years; in the meantime 60 per cent of the crops goes to them.

Mr. SCHLESINGER.—Except taxes. (Tr., pp. 75–77.)

Testimony of Harry Postlethwaite, for Plaintiff.

HARRY POSTLETHWAITE, a witness called for the plaintiff, being first duly sworn, testified on his direct examination as [123] follows:

I resided in San Jose a little over thirty-three years. I am a fruit-grower and have been such over 33 years. I know Mr. Bromley. I think I have known him since the Spring of 1919. I do

(Testimony of Harry Postlethwaite.)

not know Mr. Warren or Mrs. Warren. I owned orchards and act as trustee for a big orchard in Santa Clara, and have for a nmber of years, for the last twenty-two years I have ranched in Tulare County. I do not own any orchard in Santa Clara County to-day. I have known for 27 or 28 years the ranch which is the subject matter of this litigation. I was on the ranch quite a number of times when it belonged to Dr. Lucern. I have been on the ranch many times since the first day of December, 1919. According to my memorandum I was there after the first day of December, 1919, on January 7th, the first time after Bromley had it. (Tr., pp. 77, 78.)

Q. What was the general condition of the property at that time in your view, as an experienced orchardist?

A. The orchard and trees were simply in a rotten condition; the place looked as though it had not been cared for, for years.

(Witness continuing:) I might say the trees were falling to pieces with rot, a great many of the old trees, the trunks were absolutely rotten; once or twice I put my hand right through the trunk, and told Mr. Bromley to shake hands with me; and the young trees that were interset among the old trees, I made the remark they were practically dead, giving the reason that they had not been covered to protect them from insects; the borers got in, and they looked as though they were practically dead; they were so stunted. They were

(Testimony of Harry Postlethwaite.)

mostly apricots. I saw the walnut trees. I think that most of them were either dead or dying. They were young trees not bearing. [124]

Mr. BARENDT.—Q. What was the condition of the ground in which they were standing at that time,—had it been broken up?

A. No, I do not think there had been any work there that year.

Q. Had it been plowed up, or was it grass, or weeds, or what?

A. If I remember right, the ground was in the shape to do something to it. There was some ground on the place that looked as though it had not been touched for years, but not exactly on this spot.

(Witness continuing:) I am not sure at that time whether this walnut orchard had been cultivated to some extent or not. The balance of the place had. This was a short time after Bromley went there; I know he did a lot of discing on that place.

Q. What was the condition of the prunes on the northeast corner of the orchard on January 7, 1920?

Mr. SCHLESINGER.—That is objected to as wholly immaterial, irrelevant and incompetent.

A. I can't state exactly. I know there was a certain number of the trees on the place that were in good condition, but the majority were in poor condition; they had been abominably pruned; that was the cause of the rot; where a large limb had been cut off, instead of cutting close to the trunk of

(Testimony of Harry Postlethwaite.)

the tree, to give it a chance to seal up, it had been cut with a great big snag, which gives it a chance to rot.

Mr. BARENDT.—Q. What was the condition of the pear trees?

A. I think the actual living pear trees were better than the majority of other trees; the pruning had been done in a very poor way to produce crops.

Q. Are you familiar with apricot or prune trees?

A. I have had very little experience with pears, actually doing [125] it with my own hands, but with other fruits I have.

Q. What other fruits?

A. Prunes, peaches, apricots, cherries, oranges, but not with walnuts.

Q. Do you, as an expert, consider it necessary to plow an orchard?

A. I do not consider mysef an expert.

Q. With your knowledge—

A. (Intg.) I have been successful.

Q. Do you know whether this ranch was double disced?

A. I know it was disced, and disced very deeply; I was out there while it was being done.

(Witness continuing:) Many times I visited the orchard later than January 7, 1920. I went over the ranch a number of times to see what work was being done. I did not see actual water on it. I saw it when it was prepared for water, and when the water came off, I know it was irrigated whenever it could be from the creek. I saw Bromley

(Testimony of Harry Postlethwaite.)

working both the old and the new tractor. I saw the old tractor. I do not think the Bean tractor was ever any good unless it was in the hands of a thorough mechanic. I only know from hearsay from Bromley that it was not very good. I have seen Mr. Bromley work deep furrows, double discing. I know he cultivated the entire ranch. There was a bank he could not cultivate; nobody could plow it with a cultivator; he could not touch it. I would not like to say that during the first portion of the year 1920 there was a shortage of rain and that the heavy rains came in November and December, when the crops were all in.

Mr. BARENDT.—I wish at this time to offer the United States Department of Agriculture Weather Bureau climatological data, just certain portions of it which show the lack of rainfall in San Jose and to show that this was the fourth successive dry [126] year, and that in the early part of the year there was a shortage of rain, and that the heavy rains came in November and December, when he crops were all in.

Mr. SCHLESINGER.—I would like to examine it.

Mr. BARENDT.—Q. Basing your knowledge upon the work done by Mr. Bromley as seen by you, the shortage of rainfall, and the condition of the trees, do you consider that the crop obtained by Mr. Bromley was the best possible, under those circumstances and conditions?

Mr. SCHLESINGER.—Objected to as incompe-

(Testimony of Harry Postlethwaite.)

tent, irrelevant and immaterial, and not within the issues.

The COURT.—What we want to ascertain from this witness is, if he has knowledge of that character of work, whether the work done by Bromley on that place was a good, fair, farmer-like and orchardist character.

Mr. BARENDT.—That is it exactly.

A. At the time Mr. Bromley went on the place he could not make the crop for the next year; the crop was made the summer before; all he could do was to mature and gather what Warren had made the year before.

Q. Did the place look to you as though it was being properly cultivated by Mr. Bromley?

A. Yes; so much so that I told Bromley that I thought he was doing unnecessary work. He was putting more work on it than I thought was necessary in the way of cultivation.

Mr. BARENDT.—Q. Referring once more to this question of plowing: Have you yourself had any experience with apricot growing, where you did not plow at all? A. Yes.

Q. What did you do?

A. Disced and cultivated for three years on a very successful orchard at a place that is about [127] four miles from San Jose.

(Witness continuing:) I cannot tell you the exact date when I was last upon the ranch that is here under discussion. I have a memorandum-book that I put such things down in. During the season of

(Testimony of Harry Postlethwaite.)

1920 I imagine I was there six or seven or eight times during the winter and summer. I know I was there when they were picking grapes, which must have been during the fall. I think it was probably September. I have most of the notes when I was there,—six or seven times, but no more. My experience as an orchardist I don't think it is necessary to do any work on an orchard of that character in the months of December and January in the way of cultivation or pruning. Of course, a lot of men do prune at that time to avoid doing it after, and when the trees are old, I prefer pruning later; the young trees should be pruned. I think the main thing to do is to look after the gophers once a week and things like that; if there should be any water coming down to take advantage of it. The orchard look to me as though it was simply ridden with gophers and squirrels. The trees must have been girdled the season before; there were a number of trees that had been girdled and I showed them to him. On January 7, 1920, I showed him a number of trees that had been girdled, where the gophers had gone around the trunk of the tree, and partially or thoroughly taken the bark off. In most cases it does kill the tree. I have no idea how many trees had been injured in that way.

Q. Did you ever see any gopher traps on that place?

A. I know he told me he had a number of gopher traps he had put down, and the amount he had killed. It looked to me it was impossible to get rid of them.

(Testimony of Harry Postlethwaite.)

Q. There were so many?

A. I think it was the worst [128] place I ever saw for gophers. (Tr., pp. 79–85.)

On cross-examination said witness testified as follows:

I have never owned, or worked or cultivated any ranch within the immediate vicinity of the ranch in question. For 22 years I have raised oranges; for 18 or 22 years deciduous fruits in Santa Clara County. I reside in San Jose some distance from this property. This property is near Cupertino, near Saratoga, between Saratoga and Los Gatos.

Q. You and Mr. Bromley have been very friendly, and are to-day good friends?

A. We have been friends, but he has relied upon me a great deal for advice for the ranch,—that is our main friendship.

Q. Before making this contract of purchase did he consult with you about it?

A. No; he wanted to, but I was ill.

Q. You did not go on the ranch, or talk with him until a month after he had agreed to purchase it?

A. On the 7th day of January, when I was first on the ranch.

Q. Do you know anything about the history of that ranch as to production in prior years?

A. Not of very recent years.

Q. Did you know it in the year preceding the year of Mr. Bromley's agreement to purchase, that that ranch produced nearly $19,000 in crops?

(Testimony of Harry Postlethwaite.)

A. I heard that. I was very much astonished except for one reason.

The COURT.—Q. What was the one reason?

A. The year before that, 1919, in September or early in August, [129] there was 6¼ inches of rain fell in two days; I have a friend who has an orchard very close to the Warren orchard, and I believe if it had not been for that rain that orchard would have died; but they got one of the best crops they ever got, it was caused by that rain. If the Warrens did get that much I think it was caused by the same reason. If sick trees get a little high life they bud and do a little spurt that they are not accustomed to.

Mr. SCHLESINGER.—Q. You were on that ranch how many times after Bromley purchased it, up to the time he left there?

A. I could not tell you, except I may have been there a dozen times. I have notes when I was there six times.

Q. During each of your visits you had occasion to make up your mind that the orchard there, to use your own expression, was "rotten"?

A. I made that the first time I went out there.

The COURT.—Q. Did you make any inspection of the condition of the trees?

A. It was impossible to improve the condition of some of those trees. (Tr., pp. 85–87.)

(Witness continuing:) I did not count the trees. On the 7th of January, we went out there after lunch; it did not take very long to drive out; we

(Testimony of Harry Postlethwaite.)

spent the whole afternoon there. I had not been on that place since Colonel Moore had it.

Q. Are you prepared to tell the Court as to the amount of plowing done by Mr. Bromley during his occupancy?

A. I don't know as any plowing was done at all, except what I heard Bromley say. He talked with me on the question of plowing; he did not think it was necessary.

Q. Are you able to state to the Court as to what amount of double discing he had done? [130]

A. No. I did not keep tab of the discing he had done; but I told him he was doing more than was necessary.

The COURT.—Q. That was from your observation? A. That was from my observation, yes.

(Witness continuing:) The last time I was on that ranch was when they were harvesting the crops.

Mr. SCHLESINGER.—Q. Did you find the trees rather poorly pruned during that time?

A. The trees had been very, very poorly pruned for a number of years.

Q. They were badly pruned at the time of your inspection, were they?

A. I told Mr. Bromley whoever was pruning the trees was doing a very poor job.

Q. What did you have to say to him about the pruning of the pear trees?

A. I cannot remember whether the pear trees had been pruned; the pear trees had been pruned in a very poor way in years gone by.

(Testimony of Harry Postlethwaite.)

Q. You found a large number of trees that had been girdled by gophers?

A. Quite a number. I did not examine every tree.

Q. Can you estimate the number? A. No.

Q. Did Mr. Bromley state to you on January 7th that he was dissatisfied with his purchase?

A. No, he was very optimistic.

Q. Did that optimism of his continue up to your last visit in September or October? A. No.

Q. Did he tell you he expected to get from that orchard a sufficient amount of money during that year to pay a considerable part of the purchase price?

A. While the fruit was on the trees he was optimistic; he could see tons where [131] I could only see pounds.

Q. Did he discuss with you the proposition that $19,000 in crops had been taken off the prior year?

A. He told me that he was told that $19,000 was taken off there.

(Witness continuing:) I am unable to state just what amount of work Bromley had done at that place, it would be impossible to state the exact amount. It seemed to me he did work, more work, than you ever expected or imagined to be done.

Q. Did you ever, in your experience as an orchardist, ever hear of any man leaving a place without himself or foreman, or other man in charge for two months at any period of the year?

A. Yes. I did it myself for three months.

(Testimony of Harry Postlethwaite.)

Q. You have done that yourself? A. Yes.

Q. Around San Jose? A. Yes.

Q. Where is this place?

A. On the highway, near Lawrence Station.

Q. Where you had prunes and apricots growing?

A. Yes; during the months of from the middle of October to about January 1st nobody was on that place at all. I went down once a week myself to look for gophers.

Q. Do you say that with a ranch of this kind, with the existing weather conditions, the character of the soil and age of the trees, and the climatic conditions, that it would be prudent and farmer-like for a man to leave the property without anyone in charge for the months of December and January, and not return until February?

A. I consider it was a business-like thing to do. (Tr., pp. 87–89.)

(Witness continuing:) There is nothing to be done on the ranch in November and December that cannot be done later, [132] except for the gophers and squirrels;—where you cannot get water when you want it. A man can prune during the months of December and January, and he can prune during February and March just as well. The land I had reference to at Lawrence Station is 50 per cent loam, and 50 per cent gravel, particularly light soil.

Q. Is it similar soil to what we have here on the Warren Ranch?

A. No, it is a darn sight better, except that piece on the flat.

(Testimony of Harry Postlethwaite.)

Q. You have known Mr. Warren a good many years?

A. I don't know anything about Mr. Warren.

Q. He has lived in that county all his life?

A. I never heard of him.

Q. You do not regard yourself as an expert in the matter of lands in this locality—in the vicinity of the Warren Ranch?

A. I do; four years ago I appraised land for Balfour Guthrie for mortgages, and they made a good many loans.

Q. Near this land?

A. Not exactly near this land; on the Bay there.

(Witness continuing:) I noticed the walnut trees were either dead or dying. I don't know what the condition of the walnut trees were in the year preceding the occupancy of Bromley, excepting I can imagine the condition of the place, by the condition of the trees. I do not know it by any inspection in the previous year. I do not know anything about the production of the years preceding. I know, as a matter of fact, that Mr. Bromley was not an orchardist and never farmed in his life before. I understand he was told that he could get enough money out of the crop to practically pay a very large portion of the purchase price. (Tr., pp. 90, 91.) [133]

The witness HARRY POSTLETHWAITE was recalled for further direct examination.

Mr. BARENDT.—Q. Mr. Postlethwaite, you were

(Testimony of Harry Postlethwaite.)

asked on the stand yesterday whether you know Mrs. Warren, and you said "No." A. Yes.

Q. Did you ever meet Mrs. Warren?

A. I would like to contradict what I did say.

(Witness continuing:) I said I did not know her. I stated wrongly. Mr. Wilcox told me who she was before she was married. I met her as a girl. The planting season for new trees depends on the season of the year. I mean climatic conditions; it is usually January, February, or early in March. I never planted aciduous fruits between July and December. I refreshed my recollection with reference to that little acre and a half of walnut trees as to their condition. I think I was asked about its condition; the first time I went over there; I think I answered I did not notice anything particular. The second time I did. The land was somewhat like a very hard cement; it was perfectly hard. I don't remember noticing that the first time I went over it. Yes, I know the prices very well that were paid for prune, apricots and peaches in the years 1919 and 1920. The prices in 1919 were considerably higher on prunes, and somewhat higher on apricots and things like that than in 1920. In 1920 the selling price opened at a pretty good high price, but all the canneries lost money, that put down that price, and the co-operative canneries later could not make those high returns. In the year 1920, I don't remember the conditions of the different months of the rain like that. I have a little note that I looked up last night. When I was at Judge Lieb's he told me that

(Testimony of Harry Postlethwaite.)

he had never known the wells to be as low as they were that year; that he was [134] having to buy water from some other source to fill his water requirements for domestic water; he had so little water that he had to buy to supplement his own; that was August 22, Sunday. I have no recollection as to the seasonal rains or their absence. I know it was a dry year. I cannot answer the question accurately the way it was asked. In general, I know it was a very dry year. (Tr., pp. 91–94.)

On cross-examination of said witness, said witness testified as follows:

Mr. SCHLESINGER.—Q. I was not quite clear with reference to the testimony with respect to what you found on this ranch on January 7, 1920, as to the number of dead trees?

A. We spent about three and one-half hours probably, going over them.

Q. You did find a large number of dead trees?

A. Quite a number, dead and dying.

Q. Those trees were prunes and apricots?

A. May I take that back? Those young trees, while they had not budded, it is impossible to say they were actually dead, but they looked dead.

Q. Which trees were those?

A. The young trees interplanted among the old trees.

Mr. SCHLESINGER.—Q. You did find a large number of dead trees on that ranch on January 7th?

A. Trees that were apparently dead.

(Testimony of Harry Postlethwaite.)

(Witness continuing:) I am not able to estimate the number. Right where there were young trees planted there were some old trees too; a great many apparently dead, and a great many dying. There are two opinions about pruning apricots; some [135] people prune directly the crop is on, and others do not prune until the winter or early spring. I cannot state what the custom in that particular neighborhood is.

Q. I will ask you this: Considering the extent of this land, the character of the trees planted thereon, what length of time do you think would be necessary to prune in a proper and farmer-like manner?

A. I cannot say. I know the less pruning you do on prunes the better off it would be. On apricots I think it takes quite a time to prune.

Q. What would you say as to the number of men to be employed for that purpose, considering the extent of the land, and the number of trees thereon, their age and other conditions which an orchardist would take into consideration?

A. That is a very hard question to answer.

Mr. BARENDT.—Q. When you were there on January 7, 1920, was any pruning going on?

A. Yes.

Q. Who was doing it? A. A Japanese.

Q. Did you see how he was doing the pruning?

A. Yes.

Q. Was it being properly done?

A. I would not think it was done properly. It

(Testimony of Harry Postlethwaite.)

was done apparently in the same way that pruning had been done for a number of years there.

Mr. BARENDT.—That is the case for the plaintiff. (Tr., pp. 94–97.) [136]

Thereupon a motion for a nonsuit was made on behalf of the defendants, which motion was and is as follows:

On behalf of both of the defendants in this case, the defendants move for a nonsuit upon the ground that the testimony on behalf of the plaintiff fails to show performance on his part of all the acts and conditions of the contract required to be performed by him before he is entitled to maintain an action to recover damages on the contract.

The evidence fails to show that he replanted in the spring of 1920, or at all, any trees in lieu of the dead trees which existed upon the orchard. The evidence affirmatively shows that he failed to do that particular thing with respect to the removal of dead trees and the planting of new ones as required by the contract. The evidence affirmatively shows that he has at no time paid his interest due upon the contract. It further shows that he has at no time offered to pay the interest or any portion thereof. The evidence affirmatively shows that he has at no time paid the taxes upon the land, which, under the contract, he was obligated to pay. It is true that the evidence does show, by his own testimony, that he wrote to the tax collector and asked for an extension of time in which to make the payment of

taxes, but there is nothing in this complaint asking that he be excused from performance for an excusable reason, and a variety of excuses, if he had any, would not satisfy the complaint, which alleges full performance. I am confining myself to the evidence of the plaintiff which appears, up to this time, without conflict with respect to these particular matters.

In this connection, if your Honor please, I would like to direct your attention to the agreement in this case upon which the plaintiff has declared. I have an epitome of it here: The [137] agreement is dated December 1st, 1919, and it is annexed to the complaint filed in this court as Exhibit "A."

The first clause of the agreement is: That the parties of the first part agree to sell and the party of the second part agrees to buy and pay for on the terms and conditions and subject to the reservations herein provided,—then follows a description of the property.

Paragraph 2: That the full purchase price for said property shall be the sum of $51,000, lawful money of the United States of America, of which the sum of $6,000 is to be paid upon delivery and execution of this agreement. That was paid. The balance of the purchase price, to wit, $45,000 shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall

be added to the principal, become a part thereof, and thereafter bear interest at the same rate.

The COURT.—The contract provides that 60 per cent of the annual crops shall be applied, first, to the interest, and then to the principal. The plaintiff would not be in default on paying the balance of the purchase money, in complying with the provision for the allocation of 60 per cent of the crops to the defendants, if there had remained a very considerable portion at the end of five years, provided he paid it then. Of course, the contract contemplates that the interest should be kept up.

Mr. SCHLESINGER.—Yes. The first installment of interest due on that contract would have been on the first day of December, 1920. Mr. Bromley testified he made no payments of any kind or character, except the first payment of $6,000 on account of prin— [138]

The COURT.—You are mistaken. His testimony tends to show that he complied with the terms of the contract as to the 60 per cent of the crops, or instructed the Association and cannery to give to the defendants 60 per cent of the crop, to be applied on the interest and principal.

Mr. SCHLESINGER.—The contract does read that way; but if that were the intention of the contract he would not have to pay any interest at all.

The COURT.—You do not understand me. You said he had paid nothing on the interest. I say he had done what the contract provided. Now, it appears from his testimony, up to the present time

it has not yet been determined what the results from that crop actually were.

Mr. SCHLESINGER.—The point we make with respect to the interest is Clause 3 construed in connection with Clause 7. Clause 7 of the contract does not in anywise modify or change Clause 3 respecting interest. In other words, Clause 7 did not release him in any way from paying that interest on December 1, 1920.

The COURT.—I could not construe the contract in that way. Where in carrying out a contract of that kind, the party does what the contract says shall be done, and owing to the conditions which grow out of that method, the receipts are delayed, as in this instance, through the method of harvesting the crop, with the knowledge and acquiescence of the other party, the returns of the crop are delayed, he has performed his contract in that respect.

Mr. SCHLESINGER.—The clause says, and the portion which shall go to the party of the first part,—meaning Warren's 60 per cent,—shall be by them credited to unpaid interest. The interest is to be liquidated first, and the balance applied on the principal. I take it that cannot be construed into a postponement of the obligation on the part of Mr. Bromley to have paid that annually, as that clause of the contract provided. [139]

The COURT.—But the contract does not so provide.

Mr. SCHLESINGER.—Very well. Then I will pass to still another point. I don't think it would be pertinent to cite the decision of Judge Welsh

upon that point, it being the opinion of the trial judge in the Superior Court.

The COURT.—His opinion is entitled to the very highest respect, but I have got to construe this contract for myself.

Mr. SCHLESINGER.—That does not do away with the consideration of the case, or the testimony in the case.

Now, if your Honor please, passing from that point, it does not appear that at any time has Mr. Bromley offered to pay any interest; if upon an accounting it appear that interest is due, it does not appear that he has either asked for an accounting from the Canneries Company, and under that contract, "the party of the second part will notify the parties of the first part that he is ready to sell and state the price at which he is willing to sell, and if said price is the market price for the fruit at that time, the parties hereto agree to consent to the sale of said fruit and shall thereupon sell said fruit in the joint names of the parties of the first part and the party of the second part in the proportion of 60 per cent in the name of the parties of the first part and 40 per cent in the name of the party of the second part, and the portion which shall go to the parties of the first part shall be by them credited on unpaid interest and the balance on the principal hereof as herein agreed.

It appears from this testimony that there was not sufficient from the crops to have paid the interest, or, indeed, any part of the interest, or the principal. If that does not appear from the testimony, then,

again, plaintiff is absolutely [140] in default as failing to show that he has offered to pay the unpaid interest.

The COURT.—Very clearly, under this contract, in order to put plaintiff in default for interest or principal, such as to justify the defendants in undertaking to set aside the contract, it must appear that he was put in default by a demand showing specifically what their claim was, as to his failure to perform the contract.

Mr. SCHLESINGER.—There is no allegation that he has performed the contract.

The COURT.—There is evidence here, which must be taken as proving what it tends to show for the purposes of a motion for nonsuit, which does tend to show he complied with the contract.

Mr. SCHLESINGER.—Now, on the proposition of taxes: Clause 10 provides: "The party of the second part agrees to pay all taxes and assessments of whatever description which shall be hereafter assessed against said property until the payment of the full purchase price herein agreed to be paid." The testimony shows without dispute that he did not pay taxes, but simply requested an extension of time in which to pay them.

The COURT.—Look at Paragraph 15 of the contract. You will see what the effect of the failure on his part is,—it does not forfeit the contract at all. It does not say: Upon failure to pay that the contract shall thereupon be forfeited, and the other party may re-enter.

Mr. SCHLESINGER.—Section 16 provides: "That in the event said party of the second part fails to perform any of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all of the rights of [141] the party of the second part hereto shall terminate and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default.

The evidence in this case clearly shows that he had failed to make that payment. When he failed to make the payment, for our protection, to prevent liens being put upon the property, under that clause, we were entitled to do that. That did not relieve him from his primary obligation to pay those taxes.

(Citing authorities: Glock vs. Howard & Wilson Colony Co. 123 Cal. 4.)

Of course, your Honor, where one is entitled to a conveyance, and has paid his price, then the measure of damages is the price he has paid. But in this case he is not entitled to a conveyance, no one has denied him a conveyance, therefore, what possible damage can he have sustained by the act of this so-called forcible entry, made at a time when there was no one upon the [142] place, made at a time when according to the testimony of Bromley he was tired of the bargain because he had gotten "a white elephant," as he testified.

(Citing authorities: Hansbrough vs. Peck, 72 U. S. 496.)

When we take this contract into consideration, the small amount paid down,—a very small amount considering the purchase price to be ultimately paid, that this man,—owing to his condition, which should have great weight upon this motion,—did not replant trees. There were dead trees there, the contract recognized that fact. He went into possession the 1st of December, 1919, and remained until the 8th of October, 1920, and he did not do a blessed thing with respect to that portion of the contract.

The COURT.—He remained there later than that. All he removed was some of his furniture; he had a foreman there.

Mr. SCHLESINGER.—*If had* a foreman there, he did not replant those trees, which was made an important condition of this favorable contract; he did not do it. The dead trees were there according to Postlethwaite, and they were in very poor condition. He was allowed to go in there on very favorable terms, and agreed to do these things; when he did not do these things, which required the expenditure of time and money, he is clearly in default there, for which he has not offered a single excuse. The fact is, Mr. Bromley did not do that, he did not replant those trees. The fact also appears in evidence he did not prune the orchard. Your Honor cannot relieve him of that default, any more than you could relieve him from any other default, because he had not asked relief. So, I say, we are confronted with one consistent default.

(Citing authorities.) [143]

We have this analogous proposition here. This man does not do a thing. He does not say that he wants the land, or, on the contrary, that he does not want it. If he has any damage, what is his damage? It may be for the waste committed by Warren. What waste has Warren committed? He has done nothing upon that place to the detriment of the delinquent vendee. It is only in the case of mutual rescission where a recovery of the purchase price paid can be, or a part of it, recovered back.

(Glock vs. Howard & Wilson Colony Co., 123 Cal. 4; Hansbrough vs. Peck, 72 U. S. 497.)

Under our contract, all payments made were regarded as equivalent to rent. Mr. Bromley, under that authority, is certainly out, because to your Honor in considering the testimony, it must be quite plain that at least this occurred,—of course I realize I have to accept his testimony as true upon this motion,—that at least he permitted Mr. Warren to go into possession of that land. Of course, when I tried to pin him down into the admission that Mr. Warren was to take care of the land in a farmer-like way he denied it. He said he was to go in there and look after the stock,—consisting of one cow and one horse and a few chickens. At least, it would not make any difference for what purpose Mr. Warren went in there; he did not go in there surreptitiously; he did not oust anybody from the place; it was a lawful and peaceful entry, and Mr. Bromley still had the right to tender performance, and

to have gone to Warren and stated: "Yes, I will pay the taxes; I will pay the interest, I will eradicate the dead trees, I will replant new trees, I will prune the orchard, I will do all those things." But he has never offered to do it. He never made the slightest offer. Now, why has he not made it? I have frequently heard your Honor say where there is the slightest [144] suspicion of fraud you are anxious to have the facts divulged. And what are the facts?

This man went to San Jose, apparently a stranger; he is a good talker; sometimes it is a misfortune that a man is not a good talker, but it has been an observation of mine in trying cases that a glib talker will assume a very convincing manner, —Mr. Bromley is a good talker, if he had been as successful a farmer as he is a borrower this complaint would not be here. Here is what occurred: He could not pay his foreman. He admits that he owes him $350, and the foreman filed a complaint with the Labor Commissioner. Of course, he said he sent him there. He owed the butcher, the baker and the candlestick-maker. Here is his testimony:

"Q. To whom did you have reference to when you said you were discharging the man? A. Savio.

Q. You had no one else there but Savio?

A. No.

Q. Was anybody in occupancy of that place on December 7, 1920?

A. Not to my knowledge.

Q. Was there anyone in occupancy of that place

at any time between December 1, 1920 and December 8, 1920, to your knowledge?

A. Mr. Warren had access to the house the whole time.

Q. You had moved away nearly all of your furniture? A. Surely.

Q. Between October 9, 1920, and December 8, 1920: Isn't that a fact?

A. Yes, certainly. What was not necessary for that house I had in my house in San Francisco.

Q. You know that ranch needs care, and needs a man to run it? A. It needs care, yes.

Q. On July 26, 1920, did you leave with Elmer Brothers an order for certain trees for replanting on that ranch? [145] A. 300 trees, I believe.

Q. In other words, you wanted to comply with your contract concerning replanting?

A. Surely.

Q. Did you subsequently, on the 20th day of October, 1920, cancel that order, stating to the young lady, who was the bookkeeper there, that you wanted to cancel the order because you no longer had any use for the trees, as you intended to leave the country,—answer yes or no?''

As a matter of fact, I showed Mr. Barendt a card showing the cancellation.

Mr. BARENDT.—I did not admit anything on that card.

Mr. SCHLESINGER.—The fact remains that he did violate his obligation to replant trees; he gave an order for trees, and then cancelled it.

When he was asked about a conversation had with Mr. Brooks he testified as follows:

"Q. Did you in the fall of 1920, state to Mr. Brooks, at his office, or rather at the office of the California Prune and Apricot Association, Incorporated, in San Jose, you and Mr. Brooks being present, state to him in substance that because of the circumstances of your inability to raise certain funds you expected to give up the ranch, and leave for some northern country,—or words to that effect?

"A. No. I had a few conversations with people in San Jose, officials whom I met, and even meet to-day, and told them the orchard was not a profitable investment; that I meant to go through with my contract, but I should leave the place in the hands of a foreman, visiting it frequently, but would also follow my previous business pursuits."

Then later, he testified he considered the place a "white elephant." [146]

When he was asked about a conversation with the Warrens in which he said that he had no money to pay the balance of unpaid interest due, or to care for the property, that he was going to discharge his man because he could not pay his wages, and that he owed him a large sum of money, and that he would not do anything on the farm until February, if defendants wanted to care for the ranch they must do it themselves, he testified:

Q. Did you see them on that occasion?

A. Yes. This probably transpired at the time, —that I was owing my man his wages; that I could not pay him; he would be paid later on; he was

leaving me to find work. I also told them that all the work necessary to be done was finished up to the end of February, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, and also to provide funds for the overhead of that orchard, which was—I believe I used the expression to Mr. Warren—that it was a "white elephant."

When you take these admissions of Mr. Bromley in conjunction with the admitted fact that he had not paid taxes, has not concerned himself with paying the interest, had not paid his foreman, and even up to this date is head-over-heels in debt for debts he contracted after he made this contract, that he left the place, he permitted Warren to go into possession. He further testified:

"Q. What did you ask Mr. Warren to do for you?

A. Feed my cattle."

Mr. Warren went in there to feed his cattle; he had a right to be there. Suppose in undertaking to feed his cattle he assumed the voluntary obligation of working the farm, and employing three [147] men at great expense for a month and a half. Suppose he had done that; what is the damage to this man who tenders nothing?

"Q. You had no man in charge of that place during that time? A. No.

The COURT.—Q. They would milk the cows?

A. Yes.

Q. Were they to have the milk? A. Yes.

Q. Were the cows giving milk?

A. Yes,—one cow.

The COURT.—He said he did not ask them to look after the place. He had an arrangement with Mr. Warren to feed the cows and the horses and the chickens, and to take the milk and eggs."

I do not think that Mr. Bromley can make one horse appear as two or three.

The theory of the plaintiff must be where he seeks to recover money back—there was a mutual rescission,—he relies upon this notice. I want to call attention to the authorities in this state covering this kind of a notice. Here is the notice. (Reads.)

It has been frequently argued that a notice of this kind constitutes a mutual rescission, but the Supreme Court of this state and the Supreme Court of the United States have held otherwise.

(Citing: Pfeiffer vs. Norman, 133 N. W. 97.)

In the latter part of this letter is the word "terminate," which is not the equivalent to "rescind."

I want to impress this consideration upon your Honor, if I may: I have a sort of a ranch up in that county. I know a little something about the conditions up there. I know that orchards in that county require the most tender and careful attention in order to make them productive, which we are prepared to show. [148]

As to this proposition of re-entry,—as to Warren's right: He had the right under the contract, of course, to go there to inspect. We claim that he had the right, under the admitted conversations with Bromley, to go in there and take care of the place, there being no one there; and entirely aside from that, this man was interested in the crops under the

agreement. Under the agreement Mr. Warren had the title of 60 per cent of the crops grown on said orchard each year hereafter during the life of this contract until the same is sold and the procceds disposed of in the manner provided for in the contract. Here is the situation confronting him; Bromley announces his intention of leaving, leaving on October 8th, and then finally returning three or four or five times, leaving that valuable property entirely unoccupied. Here is Warren who had owned that ranch for a year many years; he found the place practically abandoned. We will show there was no one in charge. Mr. Warren had due him some $46,000 in money; he had 60 per cent of the crops due him; he knew of the financial embarrassments of this man throughout the county, especially the fact that he owed the foreman. What was he to do? What would any prudent man have done? Was he to delay going in there day after day and allow that orchard to go to rack and ruin. He did that of which no honest man can complain,—he went in there and did the best he could.

And what, I ask you, are Mr. Bromley's damages under the circumstances, when he does not pay anything, and when he admits that he has not performed one of the conditions of the contract namely, the condition as to removing the dead trees and replanting new ones. According to the testimony of Postlethwaite the trees were dead, and should have been replanted; the orchard was [149] in a horrible condition. Bromley was there for ten months, he could have replanted trees, but he did

not replant any of the trees. That is the situation confronting Mr. Warren, and he had the right to consider that the future would be just exactly as the past. This man told him the place was "a white elephant"; he had been disappointed in it.

Mr. BARENDT.—May it please your Honor: This is not an action for waste, it is not an action for the conveyance of real property. This contract is absolutely at an end. This is an action in implied *assumpsit.*

The COURT.—I understand the theory upon which you are proceeding. As I stated at the outset, the plaintiff had a right to the different courses: He could have sued upon the theory that he had fully performed his contract and the defendants were without right to rescind, and insist upon specific performance, or he could acquiesce in their undertaking to rescind and treat the contract at an end, and sue for the damages resulting therefrom.

Mr. BARENDT.—There is one point here with reference to the planting of trees. Time is the essence of this contract. A man cannot stand by and see another man fail to observe the terms of his contract, and, later, when it is too late, say, "You did not perform." In other words, Warren was on friendly relations with Bromley; he was his next-door neighbor; he knew that Bromley was a greenhorn in this business, and he knew the conditions of the weather, and he knew whether it was a fit time to plant trees, or not. He cannot come here, where he makes no complaint for the performance of any of the terms of this contract, and say he did not do

this, and he did not do that. Therefore, I claim a forfeiture.

The COURT.—I think Mr. Schlesinger ignores some of the [150] cardinal principles which cover transactions of this kind. The plaintiff may have been in default, but it does not yet appear, and it did not appear at the time when the defendants went upon these premises. On a motion of this kind I cannot say that he has made a case which is such as to entitle him to recover in opposition to what may be presented by the defendants. On aa motion for nonsuit the Court is bound to take the evidence that has been presented on behalf of the plaintiff as establishing that it tends to prove, in absence of anything to the contrary,—at least as to the payments made by him on this contract. As to the other items it is a different thing. At this time the case presents a situation where the plaintiff's evidence has made a case such as to preclude the Court from granting a nonsuit. Upon the showing made by the plaintiff, whether it shall prevail, or not, when the case is entirely before the court, he is entitled to recover damages resulting from the breach of the contract by the defendants, who re-entered those premises, and took them out of his possession, and untook to rescind the contract. He has acquiesced in that action, and has resorted to the remedy which the law gives him of seeking damages. The motion for the nonsuit will be denied.

Mr. SCHLESINGER.—We note an exception. (Tr., pp. 98–113.)

Testimony of Charles E. Warren, for Defendants.

CHARLES E. WARREN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I reside at Cupertino on the Homestead Road and have resided in Santa Clara County for about 45 years. Mrs. Mabel D. Warren is my wife. I am an orchardist by occupation and have been such about 25 years in Santa Clara County. I certainly know the property involved in this contract. I have known it for [151] eleven years. I farmed that property for about eleven years; one year Mr. Bromley had it; that year I did not farm it. I am familiar with pruning in that orchard. The proper time to prune land, any orchard in Santa Clara, except peaches, prunes and apricots would be when the tree is dormant; that is from November to the 1st of February. In 1920 I lived next door to this property, on the adjoining piece of property. I had occasion to inspect that ranch in the year 1920. Up to October of that year Mr. Bromley was occupying it. I had a conversation with him with respect to caring for the place. I don't know as I told him anything with respect to pruning to do, because when he went there the pruning was properly done; but he finished up the coming year. The man he had there was not an orchard man. The place was not plowed in 1920. Part of it was double-disced two or three times, the other part once. About one-half of it was double-disced. Part of the

(Testimony of Charles E. Warren.)

pruning was done in 1919 and part of it was done in 1920. The pruning in 1919 was done under my supervision. The pruning in 1920 was done under the supervision of Mr. Bromley. I re-entered that place on December 8, 1920. (Tr., pp. 113–115.)

Q. State to the Court the circumstances under which you made the re-entry? A. In what way?

Mr. BARENDT.—That is objected to; he is bound by the statement he made as to why he re-entered. It is immaterial under what circumstances he re-entered.

The COURT.—He is showing how he came to go back there. They have a right to show what the grounds were that they re-entered, within the terms of that notice. They cannot be permitted to show he re-entered because he had not paid interest, or had not paid the purchase price, or re-entered because he had not paid taxes. I am talking about the notice. He cannot at this time put [152] the cause of his going upon this land on any other ground except that stated.

Mr. SCHLESINGER.—It says "many of the terms and conditions." No notice is necessary at all.

The COURT.—You are absolutely wrong in that. (Tr., p. 115.)

I entered the place because it was not being taken care of. There was no one on the place. I had to look after my own interest. I had a conversation with Bromley prior to re-entering. I had one, the last one I had with him was in the latter part of No-

(Testimony of Charles E. Warren.)

vember [153] 1920, and Mr. and Mrs. Warren were present. Mr. Bromley on that occasion said: "I came down to see you if you would not do the work on the place." I says: "Mr. Bromley, I have more work than I can really attend to myself; I am not going out to work for somebody else. He said, "I am going over to tell my man to leave, and if anybody does any work on the place before February, you will have to do it." When I went there in December 8th, I found that the pruning had to be done. The brush had to be picked up, spraying had to be done. You had to remove old trees, so you could replant others, and get the ground into condition for water when it came down the creek for use. I put three men to pruning. I put one man to picking up the brush. In my opinion as an orchardist that work was absolutely necessary. It takes three men to prune 50 acres about a month and a half. My men were employed there about a month and a half. I paid those men. I picked up brush; took trees out, so we could replant, and got the ground in condition so we could begin to irrigate. I removed the trees for planting the other trees, ripped up the ground, preparing it for water; when the water came, I started the pump and was irrigating. I dug up prune and apricot trees. They were girdled with gophers, and I had to take them up. They were dead trees. I replanted over 560 trees. Not to my knowledge had there been any trees replanted or dead trees dug up during the time of Bromley's occupancy. There were no trees replanted. I

(Testimony of Charles E. Warren.)

don't think any dead trees had been dug up. I examined the place. (Tr., pp. 115–118.)

Q. Who paid the taxes on that place for the year 1920?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained. [154]

Mr. SCHLESINGER.—Exception.

Mr. SCHLESINGER.—Please state under what circumstances you paid the taxes.

Mr. BARENDT.—Objected to on the same grounds.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception.

Q. Had Mr. Bromley paid taxes for the year 1920? A. He had not.

The COURT.—Q. When did the taxes become due?

A. They became due in November, and delinquent on the 6th of December; that is the first installment.

(Witness continuing:) When I entered the house on that land the house was open; the doors were unlocked; some of the doors were open. There was no one in charge. I have never been paid any interest on the purchase price by Mr. Bromley. (Tr., pp. 118, 119.)

Q. Has he ever offered to pay any balance, or pay any interest or principal?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial; there is no showing there was any interest due.

(Testimony of Charles E. Warren.)

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception.

Q. Have you ever declined to permit Mr. Bromley to pay either the interest, balance or purchase price on re-entering the land?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial. On the further ground it is not necessary for Bromley to make any such offer.

The COURT.—I think so. Objection sustained.

Mr. SCHLESINGER.—Exception. [155]

Q. Has Mr. Bromley ever offered at any time to comply with the terms of the contract?

Mr. BARENDT.—Objected to as too general, and not being specific.

The COURT.—It is clearly so. Sustained.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) I have not heard from Mr. Bromley, either in writing or talked with him personally since the 8th of December, 1920.

Q. Did Mr. Bromley state to you, ask you to go into that place and merely care for the cow and the horse and the chickens?

A. When he told me that I would have to take charge of the place I told him I had more work than I could do; that I did not care to go out to work for anybody. He says: "Then will you take care of my stock for me." I answered him, I did not care to do any work there.

Q. Did you exterminate any of the rodents after you got on the place again? A. I did.

(Testimony of Charles E. Warren.)

Q. What had Bromley done in that respect, if anything?

A. Mr. Bromley caught quite a few gophers after he came; he took me over the place, he came over to my house and got me, and took me down to a patch of about four acres of trees, seven or eight years old, and says: "What is the matter with those trees; they are dying." This was in the summer time. I says: "Those trees are girdled by gophers." He says: "What are gophers?" I says: "You know what a gopher is." We found a hole and I showed him how gophers worked, and they had girdled those trees.

Q. In your opinion as an orchardist, had Bromley farmed that place in a farmer-like or husbandry-like manner? [156]

(Witness continuing:) I did not take one tractor, or any tractor, from the possession of the plaintiff and convert it to my own use.

Q. You are also charged with having taken one bean sprayer: Did you ever convert that to your own use?

A. In doing the work on the place I used it about a week when I went there. I either had to do that or rent one.

Q. Do you know what became of the tractor and bean sprayer?

A. Yes. Artana, of the firm of Artana-Geoffroy Company, came and took the tractor away; the firm of Bean Spray Pump Company took the sprayer away. (Tr., pp. 119–121.)

(Testimony of Charles E. Warren.)

(Witness continuing:) To a certain extent those implements are necessary in farming land of that character. The tractor is used for plowing and cultivating, although you can take care of a place without a tractor. At the present time they are customarily used in farming land of that character, and were used to a certain extent in the year 1920. They are used merely as a substitute for horses. There were three horses there. One horse belonged to Bromley; he brought it there when he came; the other two belonged to the ranch. I have not converted that horse belonging to Bromley to my own use. It was not worth anything. There was about a ton and a half of hay in the barn. He paid $35.00 a ton for it. I fed the horses and the cow with that hay. When I re-entered the place the cow was so nearly starved she could hardly walk. The riding horse was in fair condition. There were a few chickens on the place what the dogs had not got. I did not convert them to my own use. There were about fifty chickens. I took possession of the chickens. They [157] naturally stayed there on the ranch. I fed them and I bought the feed. There was absolutely no feed for the chickens when I went there. Neither Bromley or anybody else protested against my feeding the chickens or the horse or the cow.

There was no lumber there when I went there belonging to Bromley. There was a cultivator there belonging to him and is still there. It has been there ever since. I did not sell it or try to sell it.

(Testimony of Charles E. Warren.)

He has never asked me for the return of those things. I did not use the cultivator. There was a disc belonging to Mr. Bromley. I did not use it. It is there now. The 300 fruit trays are there. I have not tried to sell them. The 150 forty pound lug boxes are there. The cook-stove is there; I used it. It was in the house connected with the water boiler; when we went there we naturally did not care to tear it out. I have not injured it. The carpet is rolled up in the basement. I did not use the grass rug. It is rolled up in the basement. The ice chest is there. I did not use it. The window screens were tacked on the house and they are still there. The brass curtin rods are still there in the house. The linoleum is still there. The trunk and other personal effects are all there. I did open the trunk and put in a lot of things I found on the floor, and shut the trunk up. I did not take any personal effects from that trunk. (Tr., pp. 121–125.)

I farmed that orchard during the year 1919. I have a memorandum what the production for that year was. It was $19,700 and some odd dollars. 1919 was a comparatively dry year. I had farmed it for several years. 1919 was an exceptional year.

Mr. SCHLESINGER.—Q. What is the yield this year? A. You mean the returns? [158]

The COURT.—Q. You mean, from last year?

A. That is a conflicting question; we are waiting for our money from the Prune and Apricot As-

(Testimony of Charles E. Warren.)

sociation; from them and from the cannery would amount in the neighborhood of $7,500.

Q. What were your returns in 1917, in round numbers?

A. I think it was somewhere around $6,000 in 1917.

Q. So that 1919 was a very exceptional crop?

A. It was an exceptional year. (Tr., pp. 139, 140.)

(Witness continuing:) Before I re-entered the place on December 8th, I had several talks with Savio, the man in charge. The last talk I had with Savio, I think, was about the middle of November. That was the last time I saw him. The conversation was over on the place. Mr. Bromley was in occupancy of that place in December, 1919, and throughout the whole month. He was also in occupancy of the place during January. In fact, during all those months, up to practically the 9th day of October. Sometimes we start to plow it there in February. In February, 1920, Mr. Bromley had not plowed that place. In February, March or April of 1920, Bromley used what we call a disc harrow. It is not the equivalent to plowing. The proper treatment between December and April of 1920 of that soil would be to plow first, then you can use a disc harrow, or disc cultivator after that to keep the ground mixed. The purpose of plowing is to stir up the ground thoroughly and turn it over, so that the ground may be turned up to the sun, to stir up the hard dry fields there, packed from

(Testimony of Charles E. Warren.)

the rains during the winter. The effect of the lack of that on the part of Mr. Bromley on the prune production was that the moisture goes out of the ground when you do not plow that with a cultivator thoroughly, and the fruit does not mature, [159] and the trees suffer very materially. Under this contract I was to receive 60 per cent. (Tr., pp. 140–142.)

Q. How much did the 60 per cent of the fruit sold for the year 1920 amount to? A. $1,926.35.

(Witness continuing:) When I turned the orchard over to Mr. Bromley it was in first-class condition, and the year prior produced $19,000.00. When I re-entered the place it was very much neglected. There was more rain in 1919 than there was in 1920. I think there was about fifteen inches of rain in the Valley in the year 1919. There was water available for irrigation for ten years preceding 1920. There was water available for the adequate irrigation of that ranch during the year 1920. Mr. Bromley irrigated about one-third of the place, fairly well, and about one-half of the place,—that is, I should say about one-half of the place was irrigated partially. You might say one-fourth of the place was irrigated fairly well. He did not succeed in raising crops the equal of any produced on similarly situated land. His acts did not increase the value of that land. His acts decreased the value of the land to the extent it will take me five years at least to put it back into the condition it was when he received it. Mr. Bromley between the first of

(Testimony of Charles E. Warren.)

December, 1919, and 8th of December, 1920, had not replanted any trees. The customary time for replanting trees is as soon after the first rains as you can possibly plant them; December or January is generally the month that you should get them in. We had rains in that county after the first of December, 1919. (Tr., pp. 143, 144.)

Q. You said you received 60 per cent. How did you apply that 60 per cent?

Mr. BARENDT.—Objected to as incompetent, irrelevant and [160] immaterial; it does not matter how he applied it.

The COURT.—The contract states that.

Mr. SCHLESINGER.—I want to show the actual amount received, and how he applied it. We claim that the interest had to be paid in any event.

The COURT.—If that is your construction, I cannot agree with that construction. The contract reads: "The balance of said purchase price, to wit, the sum of $45,000 shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate." That is the provision which controls the rights of the parties under the contract as to interest. If the annual interest is not all compensated in the way the contract provided, plaintiff would have had a right to pay it out of

(Testimony of Charles E. Warren.)

his own pocket; if it is not paid, the contract provides it shall become a part of the principal and bear interest. It is one of those contracts that is made in view of the exigencies and uncertainties that arise out of agricultural pursuits. The contract provides that the entire balance of $45,000 shall be paid within five years, but then it provides, and that was for the sellers' security, that annually 60 per cent of the crop shall be allocated to him, and he out of that should first apply it to interest, and then on the principal, but the purchaser is given a lee-way of five years in which to be able to make the price of the property." (Tr., pp. 144, 145.) [161]

On cross-examination the witness testified as follows:

I think the rainfall in 1920 was about twelve inches. [162]

Q. Kindly look at the answer and see what your statement says, on page 5, line 15 to 20.

The COURT.—Read it to him.

Mr. BARENDT.—(Reading:) "Defendants allege that said payments were made in installments upon the dates and in the amounts as follows." The items are set forth, and those items aggregate $2,064. That was the 60 per cent you received?

A. But there has been a rebate since then.

Q. I will ask you the question, whether you received that amount?

A. Yes, I received that money, but there has been a rebate since then,—"red ink" as we call it.

(Testimony of Charles E. Warren.)

(Witness continuing:) I am a director of the Santa Clara Growers Association. That is a branch of the California Canneries. I do not as such director have representation on the board of the California Canneries. The Santa Clara Growers Association is a local organization; the California Canneries is a state organization. I have no connection whatever with the California Canneries. I have never received any credit since December 18, 1920, for any stock in the California Co-operative Canneries, which had been allotted to Bromley. When a fruit-grower joins a co-operative cannery he agrees to take a certain amount of his payment in stock. The canneries also retain ten per cent of the net value. I don't know that since this suit was commenced Mr. Bromley wrote to the Co-operative Canneries and directed that I should be given credit for both of those amounts, 10 per cent of the new value and 173 shares of stock. I don't know what the value is of 173 shares of stock.

Q. You don't know?

A. No. I would not take it if he did. [163]

Mr. SCHLESINGER.—I move to strike that out, as an attempt to controvert the plain terms of the written contract.

The COURT.—Overruled.

Mr. SCHLESINGER. — Exception. (Tr., pp. 148–150.)

(Witness continuing:) I would not take it. When I joined the cannery I had to take so much stock, yes. I own about 900 shares. I would not want to

(Testimony of Charles E. Warren.)

add 173 shares more to my holdings. I went on Bromley's ranch perhaps once a week. I never on any occasion asked Mr. Bromley not to irrigate his land so much so that I might have water for my ranch.

Q. Was not more water used by Mr. Bromley on his 50 acres than was available for your 75 acres?

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

A. Yes, and I wanted him to use it.

(Witness continuing:) I never asked him to shut down. I worked at night. The reason I did not work daytime was that Bromley was using the water daytime, and Bromley would not work at night. The reason I did not run my pump in the daytime was that Bromley was using it.

Q. There was not enough for both of you, day and night?

A. Because my place prepared to use the water, all over the place.

Q. Just now you said you did not use it in the daytime because Bromley was using it?

A. That is true.

Q. If that be the fact, there was not enough water for both of you? A. If I had pipe-lines to use it.

The COURT.—Q. Why couldn't you use it to the extent [164] that you had facilities to use it, why couldn't you use it in the daytime?

(Testimony of Charles E. Warren.)

A. Because I would not ask Bromley to give up water to me.

The COURT.—You just said there was plenty of water, but you did not have facilities to put it on the ground.

A. I watered all I could at night. There was only one little place.

Mr. BARENDT.—Q. You have just now stated that there was plenty of water for both of you, and then I asked you why you did not water your ranch in the daytime, and you said because Bromley was using it. If there was enough water for both of you, why didn't you water in the daytime when Bromley was watering?

A. I did not want to take the water away from that place.

The COURT.—Q. You would not have to, according to your statement there was enough for you and him to use.

(Witness continuing:) I used Mr. Bromley's pump, one night and half a day, in the whole year. I did not have a pump of my own. I bought that place in the fall, and did not get a pump in. I bought a pump to put there, but did not put it in; the only reason I did not put the pump in was I could not get a [165] motor from the P. G. & E. Company to run the pump. I connected up that pump that Bromley had after he left. To irrigate my ranch in 1920 I put in a cement pipe from that pump—I did not irrigate the place, only a small

(Testimony of Charles E. Warren.)

portion, one night and half a day, on the other place.

Q. You never asked Mr. Bromley to let up pumping at night so that you might have water?

A. Mr. Bromley never pumped at night.

Q. I am asking you if you ever asked Mr. Bromley to let up pumping at night so that you could have the water at night?

A. I did not, no sir, never.

(Witness continuing:) I did not say that Mr. Bromley was not pruning the place properly. It was properly pruned in the season of 1920, but not in the latter part of 1920.

Q. What do you mean, "the latter part of 1920"?

A. You must remember that our seasons are from one year to another; in November and December.

Q. November and December? A. 1920.

Q. That is the only time that you claim the place was not properly pruned by Mr. Bromley?

A. Yes.

Q. That is all, absolutely? A. Yes.

Q. Don't you know that many fruit-growers do not prune at all until after the first rains?

A. No, sir, it is absolutely wrong.

Q. Did you ever say anything to Bromley about pruning in November?

A. I spoke to him about the way his man was pruning the trees in November, 1920.

Q. Then he was pruning in 1920?

A. The man was cutting trees to pieces in a most ridiculous manner.

(Testimony of Charles E. Warren.)

Q. He was attempting to prune in 1920?

A. He was [166] attempting.

Q. Do you recall that you just said that no pruning was done in 1920?

A. I do not call it pruning.

The COURT.—I cannot put that construction on your language. You said there was no pruning done in 1920, in November and December.

A. His man would go out and prune a tree here and go off in another part of the orchard and prune a tree, and cut the trees up to pieces. I do not call that pruning. His man admitted to me he did not know anything about orchard work, and Mr. Bromley admitted it to me. (Tr., pp. 150–154.)

(Witness continuing:) Bromley did not leave two sacks of chicken feed. There is no dairy in the house. There is a pantry. They kept milk in there. The milk pans were kept there and I found them there. I did not deliver any milk at that house. I had no reason to go there. I looked after the cow. The cow was milked by my man and under my direction. He used my milk pans. I suppose that we could have used Bromley's. It is not a fact that I was in the habit of leaving that house open, unlocked. The keys were turned over to Mr. Bromley. He did not find the house open. Bromley, if he was there and found the house open, he must have gone into it through a window, or something like that.

Q. You are sure that he did not go in there with Mr. Cruthers, and they walked in together?

(Testimony of Charles E. Warren.)

A. I think the Japanese boy let them in. The Japanese boy always unlocked the house he knows; he knew Mr. Cruthers.

(Witness continuing:) I don't know whether he did so on this occasion or not. There were a few gophers on the place when I sold to Bromley. I had about a dozen traps there. When I [167] went back there in December, I found about three or four traps. I picked these up in trees around in different places in the orchard. I would see them in the tree. I heard what Mr. Postlethwaite said that he had never seen a place so overrun with gophers and rodents as he did that place on January 7, 1920, a month and six days after Mr. Bromley had entered into possession. After I took possession of that property on the 8th of December I did not receive any more hay. I hauled hay from my other place and put it in that barn. It was not delivered by anyone else. It was my own hay. I did not make any use of the disc plow; he did not have a disc plow. A disc harrow or disc cultivator was still there. I did not use the disc harrow nor the disc cultivator. I did not use the tractor. I have a Fageol tractor, the one that Mr. Bromley used to have. I made a deal with the people for that tractor after they took it away. I paid $1,000 for it. I don't know what Mr. Bromley's dealings with those people were.

The COURT.—Q. In dealing with them for that tractor, didn't you know that Bromley had made some payment?

(Testimony of Charles E. Warren.)

A. They said he had made some payment.

(Witness continuing:) I don't believe the people told me the original cost of the tractor was $1,575, and there was only $500 paid on it. There was a cultivator on that ranch. I don't know whether it was paid for by Mr. Bromley or not. It is still there but I do not use it. I used about 50 of the 300 trays and I used a few of the lug boxes. Mr. Bromley told me he had a little ranch in San Jose. I don't know, I am sure whether there were gophers on his ranch. I did not go around to at least half a dozen people in San Jose when Bromley was still on my property and tell them not to give him any credit. I did not go to the Bean Sprayer Company. I never asked Mr. Fannel in the City Store [168] not to give him any credit; I asked him how much Bromley owed him. He went to his books and told me. The way things were going, I wanted to know. (Tr., pp. 154–158.)

Q. Didn't you go to Madison?

Mr. SCHLESINGER.—I think the man is entitled to find out the circumstances of this man. I object to the question as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. SCHLESINGER.—Exception.

A. Yes, I did go.

(Witness continuing:) When I went into the house there was a rug folded up, laying in the middle of the floor, and a baby buggy. I occupied the

(Testimony of Charles E. Warren.)

house and am occupying it now. I simply moved over.

Q. You went into this house and took possession and never said a word to Mr. Bromley about it?

A. No, sir.

(Witness continuing:) When I saw Mr. Bromley on November 30th, I did not agree to look after his stock. I did not agree to take care of the three houses and one cow during his absence, but I did take care of them. I fed the chickens, and also the two dogs. He had not asked me to do that. He never spoke to me about the dogs. He asked me about the stock. I told him I had all the work I could possibly do. (Tr., pp. 158–160.)

Mr. BARENDT.—Q. You don't remember an answer you gave in answer to that question this morning, and yet you are relating to a conversation with Mr. Bromley that occurred on December 30, 1920?

A. When he asked me to take care of the stock I told him I had [169] all the work I could possibly do, and I did not care to take care of the stock.

Q. Is that the same answer you gave this morning? A. I think so.

Q. Did you in February, 1920, on the ranch of Mr. Bromley's discuss in any shape, manner or form the condition of the trees on that ranch? Late in February or the first week of March, 1920?

A. I do not recall. [170]

Q. Will you say that Mr. Bromley did not say to you, in substance, "These trees look to me sick, dying"; and didn't you spend an hour or so going

(Testimony of Charles E. Warren.)

around with him, looking at the trees, and tell him what you thought of them, and did you then not say to Mr. Bromley this: "Let them stand as they are for this year and get the crop off of them, and then we will see what we will do next year"?

A. That question involves a little explanation.

The COURT.—Answer it.

A. The explanation is this: Part of that orchard is interset, interset, as I explained, with young trees between the rows; before the old ones were removed, when those got up to a certain age those old trees are supposed to come out. That is the conversation I had with Mr. Bromley; I had that conversation. He wanted to rip the whole thing out, and I said, "No."

Mr. BARENDT.—You did have that conversation? A. Yes.

Q. You knew he was a man of no experience?

A. I was directing him.

(Witness continuing:) I did not know it was impossible to buy any new trees at all in the spring of 1920. The $19,700 was not a net return for the year 1919, but was gross returns. I never told Mr. Bromley that when he bought it. My agent was informed. That was not the basis of the price as far as I know. All these other figures are gross figures in regard to the crops in 1917 and 1918. I have myself literally plowed this ranch since I took hold of it; with a plow, every bit.

Q. There is a difference of opinion between or-

(Testimony of Charles E. Warren.)

chardists as to the relative advantages of double deep furrowing and plowing, is there not? [171]

A. I can answer that by saying that by orchardists it is not considered much of a man that will simply cultivate his place.

The COURT.—Answer the question.

A. There is a difference of opinion, a very great one.

(Witness continuing:) It is customary to plant new trees as soon after the first rains as possible. I know in December, 1920, the creek ran on that place. I will admit that it was a comparatively dry year. There were no rains in January, February and March of 1920; that is when we get most of our rains. (Tr., pp. 160–162)

Q. Did you ever receive the Department of Agriculture Climatological Reports?

A. I probably know as much about water as the people who make those reports.

Q. (Reading:) "More rains fell during the last three months of the year than during the first nine months. The features of the year were the extreme cold of October, the markedly deficient precipitation of January and February; the more important unfavorable features were the deficient precipitation of the first few months of the year, the resultant shortage of irrigation water." Are those statements true, or not? A. It is absolutely wrong.

Q. I show you this Climatological Table—

Mr. SCHLESINGER.—(Intg.) What you just now read applies to Santa Clara Valley?

(Testimony of Charles E. Warren.)

Mr. BARENDT.—To the whole state.

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial; it has no application in this case. We are talking about the rainfall of Santa Clara Valley.

The COURT.—The conditions throughout the state [172] generally is more or less remote. Call his attention to the precipitation in Santa Clara Valley.

Mr. BARENDT.—In a table marked: "Monthly and Annual Precipitation for the year 1920, with Departure from the Normal," it reads: "San Jose, precipitation is 0.10 of an inch, and the Departure is—2.78. A. What did it give February.

Q. February precipitation was 1.04 and the Departure—1.50 inches. Precipitation in March was 3.43, Departure plus .45; April precipitation was .92 of an inch, and the departure from normal was minus .49. In the month of May, precipitation "T," which means "trace" of rain; departure minus .68. In the month of June it was .21 of an inch precipitation, and the departure, plus .13. July there was no rain at all. August there was no rain at all.

A. We never have rain at that time.

Q. (Contg.) In the month of September it was .02, and the departure was minus .32. In the month of October, 1.71; the departure plus .81, above normal. In November, 1.84, which was .05 less than normal. In December, it was 3.58 inches, and .53 above normal,—

A. (Intg.) December, 1920?

(Testimony of Charles E. Warren.)

Q. (Contg.) Yes; in other words, that table shows heavy precipitation in the last two months of the year.

A. That table is absolutely wrong as to the first part of the year; you will find that those tables do not correspond with different sections of the county.

Q. May I ask you whether I heard you correctly, —you said something about the rainfall in the past ten years?

The COURT.—No; he was speaking about the water in the [173] creek. He said there was plenty any time during the last ten years for irrigation purposes.

The WITNESS.—Every year.

Mr. BARENDT.—Q. Why then was it necessary to go to Mr. Bromley at all?

A. I did not have any pump.

Q. That was the only reason?

A. That is the only reason.

Q. You never complained to Mr. Bromley that he was taking the water away from you? A. No.

The COURT.—Q. Was that pump put in by Bromley on the place?

A. No, sir, I put that pump in five or six years ago. (Tr., pp. 162–165.)

On redirect examination said witness testified as follows:

Mr. SCHLESINGER.—Q. You have been asked by counsel a number of questions concerning any talk with creditors about Mr. Bromley's financial condition: Did you ever have any talk with Mr.

(Testimony of Charles E. Warren.)

Bromley as to his financial worth at or about the time he signed this contract?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCHLESINGER.—I want to show that this man represented as his worth. I propose to show that he represented he was the owner of a yacht; that he was worth a quarter of a million of dollars, and other property, a man of independent means to creditors, and everybody else up there; that the man came in there as a stranger and represented himself as a man of independent means.

The COURT.—We are here to pass on and determine the [174] rights of the parties under this contract.

Mr. SCHLESINGER.—To prove these things it is absolutely necessary to show that he was a man of absolute irresponsibility; he was not even paying his foreman, the only man he had there.

Exception, please. (Tr., p. 165.)

Testimony of Ralph G. Spencer, for Defendants.

RALPH G. SPENCER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I reside in San Jose. I am in charge of the growers and fruit account of the California Co-operative Canneries. Our legal principal office is in San Francisco; our principal business transactions are in San Jose. I held that position with the Co-op-

(Testimony of Ralph G. Spencer.)

erative Canneries in the month of October, 1920. I know Mr. Bromley, the plaintiff here. I knew him during that month. I knew him for eight or nine months prior to that time. I believe I had a conversation with him concerning the Warren ranch in October, 1920. I do not recall definitely whether my assistant was a party to the conversation, but he was present,—his desk is opposite mine,—Mr. Bromley came in,—I will have to state the substance rather than the words; he asked regarding his account, the possibility of additional payment thereon. He had delivered fruit as a member of the Association, to be canned and sold for his account.

Our practice is to make advances as soon as possible; he had had partial returns. I explained that all the advances had been made that could be made at that time, and particularly in view of the fact that under his instructions there was a proportion of it to go to Warren. He said, to my recollection, the substance would be that he was expecting to go to San Francisco [175] and engage in some other business. He expressed disappointment with the outcome of the transaction. I recall the use of the words "white elephant" on that occasion. I recall that he said he expected to leave the place and go in some other occupation where he could make better returns for himself, to meet his requirements. To the best of my recollection it was in the early part of October. (Tr., pp. 126, 127.)

Q. With respect to the returns, when did you

(Testimony of Ralph G. Spencer.)

have the returns ready; when was he advised as to the exact returns of the ranch?

A. You mean the final outcome?

Q. Yes.

A. The account was completed as of April 30, 1921, which is the close of our fiscal year; it was probably a month to five or six weeks at the outside. I cannot recall the precise date, that the grower's voucher, showing the grades and the rate per hundred pounds was issued to all growers, including Mr. Bromley.

Q. At any rate, as early as April 30, 1921, an account had been rendered.

A. The account was as of April 6th.

The COURT.—It was a month or six weeks later?

A. Probably in the month of July, or the latter part of June.

Q. Was it as early as July?

A. It was as early as July. (Tr., pp. 127, 128.)

On cross-examination said witness testified as follows:

We render two accounts, the first is an account of the total returns on fruit, and the second is an abstract of the book account, including the total returns on fruit, against which the [176] charges or payments had been entered, and show an abstract of the book account. The latter sheet was issued on August 3d. The date of the first voucher I cannot give exactly; my recollection is all of them were mailed before the 10th of July.

The COURT.—Q. What is the occasion for that?

(Testimony of Ralph G. Spencer.)

A. That is the final statement of returns, but it does not show the advances. The final one is an abstract of the book account, showing the exact condition of the statement.

Q. Can you from memory state anything about the quantity of fruit that was delivered to you by the plaintiff? Had he instructed you to allocate any of the returns of that fruit to Mr. Warren?

A. Yes, sir, he had.

Q. Had you done that? A. No, sir.

Q. Why didn't you do it? A. Because we had issued advances to Mr. Bromley in advance of any accounting whatever, with Mr. Warren's knowledge.

Q. "With Mr. Warren's knowledge,"—how do you know that?

A. Because Mr. Warren was associated with the cannery.

Q. He was connected with it?

A. He has always been with the Association, although he was not delivering fruit that year. We made those advances on estimates; in the final account, the advances made to Bromley were in excess of what would have been coming to him.

Q. How much finally came to Mr. Warren? Mr. Warren stated he never had paid him on interest, and I wondered if he had in mind any returns from this fruit?

A. My recollection is a check of November 30th for $209.25 was paid to Mr. Warren.

Mr. BARENDT.—Q. What year?

(Testimony of Ralph G. Spencer.)

A. I am not prepared [177] to swear to that accurately.

Mr. SCHLESINGER.—We have those figures. Nothing had been paid by Bromley on interest to us.

The COURT.—Mr. Warren's statement was: He said "No," when you asked him if anything had been paid on interest. I wondered if that were true, that nothing had been paid.

Mr. SCHLESINGER.—Q. No, that is the fact.

Mr. BARENDT.—Q. If you had not believed at the time you made those advances that the fruit was worth considerably more than the amount of the advances, you would not have made them to Mr. Bromley, would you?

A. No, sir. (Tr., pp. 128–130.)

Testimony of Mary A. Nola, for Defendants.

MARY A. NOLA, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I reside in San Jose, and I am bookkeeper and stenographer for Elmer Brothers. They are engaged in the nursery business and were so engaged during the months of July to October, 1920. I still hold the same position with them to-day that I held with them then. I know F. G. Bromley. We received an order from Mr. Bromley but it was cancelled. The order was cancelled for those trees in October, 1920; I put it on the card myself. As I recall at the time he said he was going to leave town.

(Testimony of Maud E. Empey.)

The COURT.—There is nothing in the evidence that affects the case.

Mr. SCHLESINGER.—We take exception to that remark. (Tr., pp. 130, 131.)

Testimony of Maud E. Empey, for Defendants.

MAUD E. EMPEY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I resided all my life in San Jose, and my occupation is [178] bookkeeper. I am employed by Crothers Realty Company. The head of that concern is Mr. C. Crothers. I was employed by him in that concern in the month of August or September, 1920. I [179] know Mr. Bromley, the plaintiff. I would not be sure whether I saw him at Mr. Crother's office at the time I have indicated. It was August or September; it was in the fall just after the harvesting of fruit. I am not absolutely sure of the time. It was in the fall about harvesting time. I had a conversation with him. Mrs. Bromley was present at that conversation besides myself and Mr. Bromley. Mr. Bromley called in the office and wanted to see Mr. Crothers; Mr. Crothers being absent, he asked me if he could talk to me for a few minutes. We did. He talked to me something about his troubles out there. I don't remember what they were. I remember that he said that he wanted to know if the fruit would not be liable for the pickers' charges, and whether they could not look to all fruit,—to Mr. Warren's interest as well

(Testimony of Joseph T. Brooks.)

as the other, for their compensation; and then he stated that he had spent all of his money, that he was not going to; and no more of his private funds should go into the place. (Tr., pp. 131, 132.)

Testimony of Joseph T. Brooks, for Defendants.

JOSEPH T. BROOKS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I resided in San Jose for twenty years.

Q. What is your occupation?

A. Growers' Information Bureau of the California Prune and Apricot Growers Association, Incorporated.

Q. How many men does that concern employ?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCHLESINGER.—Exception.

(Witness continuing:) I know Mr. Bromley. I have known him since the early part of 1920. In the fall of 1920 I had a [180] conversation with Mr. Bromley in the office of the Association. I do not recollect of anybody being present. There was not anybody specific present; there are a number of field-men who might be around. They were not under conditions where they were likely to have heard it. It was the latter part of October, 1920. Mr. Bromley stated that he expected to give up the property and go north because of his circumstances. Because of the financial situation there was a con-

(Testimony of Joseph T. Brooks.)

versation in which the financial situation came in later on, if I am at liberty to state it. I had another conversation with Mr. Bromley considerably later. I am positive it was in 1921; he came one Saturday. I do not know exactly; it was a good while after he had left San Jose and then came back. (Tr., pp. 132–134.)

Testimony of Frank G. King, for Defendants.

FRANK G. KING, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I have lived in San Jose for 41 years. I know Mr. Bromley. I know Mr. Edwin A. Wilcox and have known him a number of years. I had a conversation with Mr. Wilcox, and I took Bromley up to his office; he was evidently dissatisfied with the purchase of his ranch. I had a conversation with Mr. Bromley on or about January 7, 1921. Mr. Bromley stated it was his intention to give up his ranch, he did not want it; he was dissatisfied with it, and he would not take it back if it was given to him. (Tr., pp. 134–136.)

Testimony of David J. O'Neil, for Defendants.

DAVID J. O'NEIL, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I am Special Agent, Labor of Statistics. I was a Deputy Labor Commissioner for San Francisco on the 4th day of December, [181] 1920. I know

(Testimony of David J. O'Neil.)

Mr. Bromley. I had a conversation with Mr. Bromley at 822 Clayton Street on December 4, 1920. Mr. Bromley and myself were present. I made a memorandum of the conversation at the time. I went to Mr. Bromley with a wage complaint of the State Labor Bureau. I had a claim against him by Henry Savio for $345; the bill was originally $375, he had paid $40, leaving a balance of $345. I asked Mr. Bromley if he knew the plaintiff; he said "yes." I says: "He claims that you owe him $340." He says: "Yes." He said, he acknowledged owing him this money; at present he was not able to make a payment, but if he ever should be able, be in a position to pay the plaintiff, he would gladly do so. (Tr., pp. 137, 138.)

Testimony of Herbert Pash, for Defendants.

HERBERT PASH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

My temporary residence is in Los Angeles. I lived in Santa Clara Valley from 1890 until the end of 1920 in November. With respect to the Warren place I lived just arcoss the road. I had 32½ of irrigation acres, partly in apricots, partly in prunes, partly in cherries and walnuts. I have been an orchardist in that particular place since 1893. I lived on the place the whole time. In 1893 I picked apricots there. I know the place as well as I know my own place. Apricots should be pruned immediately after the leaves have dropped,

(Testimony of Herbert Pash.)

when the tree is dormant. The apricots should have been pruned just as soon as the trees are dormant, which would vary according to climatic conditions; some years it takes a short time, some years it takes longer. I have seen trees grow into November; other times they stop growing in September. It is dependent upon those annual differences. The proper time to have pruned the apricot and prune trees on the Warren ranch was not later than December for apricots. The prunes [182] could be pruned later without affecting them. It has been my experience as an orchardist to get your pruning done immediately as you can, because you have other things you cannot do while pruning. The trees should be planted in land in that locality as soon as possible after the first rains; as soon as your soil is conditioned, dig the holes and plant your trees as early as possible. Early in January. I was on that ranch during 1919. With respect to its condition in a general way it averages with the rest of the other orchards in that locality. I was not on that ranch immediately after Bromley departed from that county in 1920. I was on the ranch during Bromley's occupancy. Not after the first of November. I was not there in the month of November, but in October. (Tr., pp. 165–168.)

Q. Did you then inspect the ranch?

A. In October?

Q. Yes. A. In a general way, yes.

The COURT.—Q. What do you mean "by a general way"?

(Testimony of Herbert Pash.)

A. Just from impressions I gathered from walking through it.

The COURT.—I would not permit him to testify regarding it.

Mr. SCHLESINGER.—Q. Did you inspect the ranch at any prior month between the first day of March, 1920, and the first day of November, 1920?

A. Yes. I walked through that orchard a good many times. I have found in my experience as an orchardist, and I have made it a practice, whenever I have spare time, it is a good thing to wander over to my neighbor's ranch to see how they are running things, and compare their methods with my own.

Q. How many visits did you make?

A. In March to October, 1920?

Q. Yes. Between March to October, 1920, how many times, [183] if any, did you visit that ranch? A. About fourteen or fifteen times.

Q. What was the purpose of those visits?

A. To notice how the ranch was.

Q. What did you observe on those visits?

A. I noticed the result of the irrigation, and the method of preserving the moisture in the soil. I noticed the condition of the trees, and the condition of the soil.

Q. What in your opinion, was it as to his management, as to being farmer-like or orchardist-like?

A. To my idea it was very unfarmer-like. He did not do what I would have done; and he did what I should not have done.

(Testimony of Herbert Pash.)

Q. What did you observe, if anything, with respect to walnut trees upon that place?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained. Moreover, I think I shall call a halt on this sort of evidence under these pleadings.

Mr. SCHLESINGER.—We take an exception.

Q. I will ask you to please state in detail just what you observed with respect to the trees, and the care of the trees on that place during the year 1920 at the time you have indicated?

The COURT.—Q. State what you saw, and the conditions that you say existed.

A. He asked me to draw conclusions from the methods.

Mr. SCHLESINGER.—Q. What did you see with respect to the trees and general conditions?

A. I noticed that the trees were suffering from want of moisture. The fruit in July apparently had suffered from loss of moisture and had dropped. The reason of the loss of moisture was the way [184] the orchard was cultivated. You understand that the moisture is one of the most important things the orchardist has to look after; from 70 to 90 per cent of the fruit taken off an orchard is water, and therefore it is of great importance to the orchardist as to getting water in the soil. If the rainfall is light he must replace that in some way. Fruit is mostly water, so you must have water in the soil to get your fruit. The consequence

(Testimony of Herbert Pash.)

of not having water in the soil on his prune trees on the flat caused them, in my opinion, to drop in July.

Q. Was that condition patent to anybody who had occasion to go on that ranch?

A. I think so.

Q. Would Mr. Warren have noticed it had he gone there?

A. Why, certainly. The general method used in serving water is to turn it in and cover the crop.

Mr. SCHLESINGER.—We seek to have him testify on this branch as an expert.

A. (Contg.) In fact, to put it in a few words: The orchard was suffering from lack of moisture. He could have put the moisture on if he wanted to. There was water enough in the creek to irrigate the whole place over.

The COURT.—Q. Is that a flowing stream?

A. After rainfall; not in the summer-time.

The COURT.—Q. You have to pump the water then from underground percolation? A. Yes.

Q. From wells sunk in the stream?

A. Not necessarily in the stream.

Q. You said there was water enough in the stream?

A. That year, yes. That year was an unusual year. It was light rainfall. It came down in December or January, ran for a short time, later in the spring it came down again. [185]

Mr. SCHLESINGER.—Q. What time in the spring did it come down again?

(Testimony of Herbert Pash.)

A. The latter part of February or the early part of March. That is a thing that was impressed on my mind, for the creek to come down early and dry up, and then come back. A man knowing that his rainfall was light should have used every endeavor to get all the water that came down the creek, and strain every effort to get that water over the ranch.

Q. Did you have occasion to go to that place during the absence of Mr. Bromley, after he had left there? A. No.

Q. Did you have any talk with Mr. Bromley with respect to his care of that place at any time during the year 1920?

A. Mr. Bromley came to me once in particular I remember, and told me that he was green at the orchard business and asked my advice. He was then cultivating early in the winter. I told him he was making a mistake.

The COURT.—Q. That was the winter of 1920?

A. Yes.

Mr. SCHLESINGER.—Q. Did he say anything with respect to small trees?

Mr. BARENDT.—I object to this form of examination.

Mr. SCHLESINGER.—Q. Do you remember anything more? A. No.

Q. Did you have any talk with respect to small trees?

A. No, I don't remember any conversation about young trees.

(Testimony of Herbert Pash.)

Q. Do you know what the reputation of that place has been prior to 1920 for productiveness?

Mr. BARENDT.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. SCHLESINGER.—Exception. (Tr., pp. 168–172.) [186]

On cross-examination said witness testified as follows:

I am a friend of Mr. Bromley's. I paid him friendly visits from March to October. Mr. Bromley asked my advice, and after I gave it, he argued on it. He did not follow my advice. I pruned my orchard in November, 1920. The trees I then pruned were apricots. When I say "I pruned them" I mean I put my man on them; I did not prune them personally. The returns from my orchard for 1920 compared with the returns for 1919 showed a wonderful loss in 1920 over 1919. In 1919 I got 61 tons.

Mr. SCHLESINGER.—Objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. SCHLESINGER.—Exception.

The COURT.—Q. How many ton in 1920?

A. I cannot say. 1920 was still on the trees, and I did not pick them. I never heard just what the tonnage was.

Q. You sold them for so much per ton?

A. No; I estimated the crop on the trees.

(Testimony of Herbert Pash.)

Q. You knew there was a large falling off from 1919?

A. Yes.

Q. How do you sell a crop on the trees; how is the value estimated?

A. The usual method is to walk through the orchard, and approximate the number of trees. You know the market price of the fruit, and you figure it out accordingly.

Q. It is more or less of a gamble on both sides,—by the purchaser that he will make, and by the seller that he is getting all that it is worth?

A. Yes.

Mr. BARENDT.—Q. Is there not a difference of opinion among orchardists in regard to the times of pruning trees?

A. Certainly; a very considerable difference. [187]

Q. You recall, do you not, that the first three months of the year 1920 were very dry months?

A. No, the first two months. I would not call March dry.

Q. You do not plant new trees in dry months, do you?

A. I cannot answer that, yes or no.

Q. Please do.

A. If the month previous has been wet you can plant them in a dry month. (Tr., pp. 172, 173.)

Testimony of Archibald Wilson, for Defendants.

ARCHIBALD WILSON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I am a dealer in general merchandise and orchardist, and my place of business is the Cupertino Store, Cupertino, California. I know F. G. Bromley. I have known him about two years now dating back from this time. I saw Mr. Bromley at his ranch on or about the first of October, 1920. I had a conversation with him. There was no one else present besides myself and Mr. Bromley during the conversation. Savio was not present. I called upon Mr. Bromley with reference to an account owing us. He said in the course of the conversation that he was without funds, and that while he had funds in other countries that he did not propose to invest any more of those funds in the Warren Ranch proposition. He also told me that the ranch, to use his own language, was "no good." (Tr. p. 174.)

Testimony of Charles E. Warren, for Defendants (Recalled—Redirect Examination).

CHARLES E. WARREN, being recalled by Mr. SCHLESINGER for further redirect examination, testified as follows:

Q. What preparations are necessary for irrigation?

A. You have to dig your land up with furrows or checks, or irrigate in long furrows, five or six fur-

(Testimony of Charles E. Warren.)

rows in a row; make your ditches, and prepare for it,—to get your water where it is necessary. [188]

Q. About what time,—when are those matters attended to?

A. On this particular property the irrigating is to be done when the creek runs. The creek dries up in the summer time, sometimes it will run until the end of March, and sometimes until the end of June. I always water in February and March, and sometimes in January.

Q. What preparations were necessary in 1920?

A. It was the same conditions.

Q. Were you familiar with the water there during the year 1920? A. Yes.

Q. What were the conditions?

A. The conditions were, the rainfall was a little light to what it had been, but the creek came down in December; then it stopped for about two weeks. Then it came down in January, from then until the end of March it ran on and off. I figure the creek ran that year, I watched it very closely, for about eight weeks.

Q. What about the quantity of water during that time?

A. There was plenty of water. Of course, in a year like that you have to use your common judgment, and work long days and nights, so as to be sure you are going to get the water.

Q. Did you have any conversation during the year 1920 upon that subject with Mr. Bromley?

A. A great, great many of them; about once a

(Testimony of Charles E. Warren.)
week during that season I talked to Bromley about water.

Q. What did you say?

A. I said, "Mr. Bromley, you ought to work longer days, and ought to work nights, to be sure you are going to get plenty of water for the ranch." I said: "If it runs later on so much the better, but be sure you [189] get enough water." He said he would take care of the ranch; that is all I could get out of Bromley on any of my talks to him. (Tr., pp. 175, 176.)

Testimony of Herbert Pash, for Defendants (Recalled—Redirect Examination).

HERBERT PASH, being recalled for further redirect examination by Mr. SCHLESINGER, testified as follows:

I was familiar with water conditions of the Warren place in the year 1920. In the early part of the year 1920 there was little water in the creek, being a dry year the water was not steady all the time. It came down early in the year, in January, and dried up and stopped. The creek was dry for a little while. After a heavy rain later during the end of February, there was quite a little creek water coming down. I cannot remember just how many weeks it ran. There was enough water in the creek to irrigate Mr. Warren's place, provided it ran steady day and night and did not stop. I was on the same creek. The name of the creek is Stephen's Creek. (Tr., pp. 176, 177.)

Testimony of I. Okumura, for Defendants.

I. OKUMURA, a witness called on behalf of the defendants, being duly sworn, testified as follows:

I live in Cupertino. I know Mr. Warren. I worked eleven years for him. I worked on orchard work. I know all about the Warren ranch for eleven years. I worked for Mr. Bromley four months and ten days. I commenced to work for Mr. Bromley December 1st, and I quit April 11th. While I was there Mr. Bromley did not do any plowing on the place. The proper time for plowing was about the first of February. I talked with Mr. Bromley about plowing. He said: No plowing, just discing and harrowing.

Q. What is discing and harrowing?

A. Just double discing.

Q. What did Mr. Bromley use, if he did not do any plowing? [190]

A. I mean discing, and spring cultivator.

(Witness continuing:) I had a talk with him about that. I says: Better plow first, then with a disc, then after with the spring cultivator. The water conditions there from the first of January, February and March there was plenty of water in the creek. He started pumping at 10 o'clock and quit at 5 o'clock in the afternoon.

Mr. SCHLESINGER.—Q. Did you have any talk with him about pumping the water, about starting the motor?

A. Yes, starting the motor; the first time I work for Mr. Bromley I start the motor 7 o'clock

(Testimony of I. Okumura.)

myself. Then Bromley says: "Do not start so early." So I start the motor myself; he did not start the motor before 10 o'clock.

Q. What time should the motor have been started?

A. The motor should have been started about 5 o'clock in the morning; quit about half-past eight; plenty of water in the creek then; bye-and-bye, not so much.

Q. You say there was plenty of water in January, February and March? A. Yes. (Tr., pp. 177–179.)

Testimony of F. Genn Bromley, in His Own Behalf (Recalled—Cross-examination).

F. GENN BROMLEY, being recalled for further cross-examination, testified as follows:

I know Mr. E. A. Wilcox, the attorney. I met him on one occasion.

Q. Did you call on Mr. Wilcox at his office in San Jose, on January 7, 1921, there being present Mr. King, Mr. Wilcox and yourself?

A. Three of us were present; as to the exact date I cannot tell you without looking at the diary, but probably you are correct. [191]

Q. Did you have a conversation with Mr. Wilcox at that time and place, those persons being present, in which you said, in substance, that you would not take back the place as a gift, and that the personal property on the place which you had left there you cared nothing about; and didn't you state as

(Testimony of F. Genn Bromley.)

to the horse that they could do with it as they pleased,—or words to that effect, in substance?

A. I would say "No." Then I will give my explanation: After considerable conversation with Mr. Wilcox respecting the letter he had written to me, against which I protested, the conversation turned to, Would I take the place back? I said: "No, not after this action." With reference to my personal belongings, I made the reply: "Those would be subject to after consideration." With respect to the horse, I forget exactly my words, but I know everything that was left there on the orchard at the date when Warren and his attorney took that action—

The COURT.—(Intg.) What action are you speaking of?

A. (Contg.) —taking possession, those articles were subject to the same conditions.

Mr. SCHLESINGER.—Q. You received this letter, did you not, dated December 9, 1920, and marked Plaintiff's Exhibit No. 2?

A. Yes, this letter you have just been questioning me about, that I saw Mr. Wilcox personally in respect to. I protested that letter.

Q. You did answer this letter in writing?

A. No.

Q. But you answered it in the conversation you have just related? A. Yes.

Q. You answered by the conversation which occurred on January 7, 1921? A. Yes. [192]

(Testimony of F. Genn Bromley.)

Q. You mean by "protesting the letter," protesting what they had done?

A. I protested the action taken implied by that letter, because that letter was the first legal advice of what Mr. Warren had done. I had no information, except from my foreman Savio.

The COURT.—Q. Your foreman had informed you they were in possession? A. Yes.

Mr. SCHLESINGER.—Q. Then, the next thing you did after receiving that was to commence this action? A. Yes. (Tr., pp. 179, 180.)

Mr. SCHLESINGER.—That is the case for the defendants.

Testimony of F. G. Bromley, for Plaintiff (In Rebuttal).

F. G. BROMLEY, the plaintiff, called in rebuttal on behalf of the plaintiff, testified as follows:

Mr. BARENDT.—Q. When Mr. Warren was on the witness-stand yesterday, I asked him whether it was not a fact that on or about the last day of February, or the first week or so in March, 1920, he did not have a conversation with you on your place with reference to the condition of the sick trees, and whether he had not stated: "We will let them go for this year, and gather the crop," and he said something of that kind was said. Will you now state what was said and done on that occasion?

A. The occasion of that visit, Mr. Warren came right through the orchard discussing general or-

(Testimony of F. G. Bromley.)

chard matters, and when we came to a section that had been interplanted with young trees the previous year, one point I raised was working the land; I was very anxious to get my ground right, which was then as hard as cement, when I went there the first time. I wanted to work that land up so when the irrigation came my water would saturate the soil. [193]

The COURT.—State what was said.

A. The newly planted trees were not in alignment with the old trees standing there, consequently it was very, very difficult to get any machinery to work over that ground. My idea was to draw out the old trees, and cultivate and encourage the young trees.

Mr. BARENDT.—Q. Please state what you said, and what you did on that occasion?

A. This is the conversation.

The COURT.—State it that way, then.

A. This conversation actually took place.

Mr. BARENDT.—Q. What was the condition of the place at that time?

A. Those old trees were dying.

Q. Did you draw Mr. Warren's attention to it?

A. Yes.

Q. Tell us what you did.

A. Mr. Warren said he considered it would be better to take advantage of that year's crop on the old trees and let them stand at least one more year.

Q. Were you then prepared to put in new trees?

A. I was prepared, if new trees were obtainable.

(Testimony of F. G. Bromley.)

Q. Did you try to obtain new trees at that time?

A. Yes.

Q. Where?

A. At the principal nursery houses in San Jose. (Tr., pp. 180, 181.)

Q. At that time did Mr. Warren examine any of those trees with you? A. Yes.

Q. What did he do?

A. He examined the trees and specified generally his views and ideas.

The COURT.—Q. What did he say?

A. He said: "Leave those trees for this year, and take advantage of the fruit on them; they will bear.

Q. (Mr. BARENDT.) *Q.* You heard Mr. Warren say you asked him what gophers were: Did you ask Mr. Warren such a question? [194]

A. No.

Q. Did you know what gophers were?

A. I ranched for eighteen months prior to that.

Q. Had you ever caught gophers before?

A. Quantities of them.

Q. Where?

A. In my place in San Jose; also on the little ranch I had previous to owning this property.

Q. How many gopher traps were there on that ranch when you went there?

A. About one dozen.

Q. How many did you put on?

A. At least six dozen.

The COURT.—I do not care anything about this evidence at all; I would not spend time on it.

(Testimony of F. G. Bromley.)

The WITNESS.—And kept them working all the time.

Mr. BARENDT.—Q. Outside of trapping did you do anything? A. Killed and shot squirrels.

The COURT.—He testified he poisoned them, and that he hired boys to come there for two or three weeks to shoot them.

The WITNESS.—They were two nephews of Savio's; they were paid for it.

Mr. BARENDT.—Q. You heard the statement made that Savio was a wholly inexperienced man, —or words to that effect, on cross-examination of Mr. Warren, that Savio knew nothing about orcharding. Is that a fact? A. No.

Q. Was he or was he not an orchardist?

A. His career is that of an orchardist for years before the war. He served during the war as a noncommissioned officer; when he was released from the army he took up his pursuit again, and is now running his own orchard. [195]

Q. When Mr. Pash was on the stand he was asked how often he had been on your place,—you remember he counted on his fingers, and then answered "fourteen." Do you know how often Mr. Pash was on your place?

A. As far as my knowledge goes, it was about twice. It was very, very hard to get Mr. Pash to visit the place; he always complained he was busy.

Q. Did you ever invite him to come over to the place? A. Many times.

(Testimony of F. G. Bromley.)

Q. Mr. Pash further testified that he took water from Stephens Creek?

A. Mr. Pash has two irrigating means; one in the creek, and he bored a well. As far as I know that creek pump was never used, while I lived in that district he used his well pump only.

Q. You also heard him state when he was asked what crop did he get off in 1920 that he could not answer, but it was very much less than the 61 tons he took off in 1919, because he sold the crop on the tree. Do you know, as a matter of fact, whether that crop was gathered by Mr. Pash, or not, and if so, state how you know?

A. The pickers whom I engaged to gather my own fruits also made a contract with Mr. Pash to gather his, and they were paid so much for it. In dipping my own men used to help Mr. Pash at his dipper, and the men who worked that dipper were paid so much per ton for their work.

The COURT.—Q. Are you sure that it was in 1920? A. The same time I was on the ranch.

Mr. BARENDT.—I offer a record of the irrigating done by Mr. Bromley as shown by his diary, showing the digging of ditches, of water and irrigating ditches, commencing as early as [196] January 23, 1920, and continuing until June 28, 1920.

Q. Your diary will show that? A. Surely.

Q. And it is true? A. Absolutely.

Mr. SCHLESINGER.—We object to any notes in detail.

(Testimony of F. G. Bromley.)

The COURT.—They have a right to have the testimony of the witness. Do not testify as to what is in the diary.

Mr. BARENDT.—Q. Without referring to that diary, could you give us the dates and the amount of pumping you did on that ranch? A. No.

Q. That diary is all in your own writing?

A. Correct.

Q. When were the entries made?

A. Day by day.

The COURT.—The purpose of a personal memorandum of any occurrence which is made at or about the time of the occurrence is permitted to be used for what purpose? Not as evidence, but the witness is permitted to refer to it for the purpose of refreshing his memory as to the fact he is then testifying about as to what the fact was, with his mind refreshed by the note which he made at the time.

Mr. BARENDT.—Q. I will ask you to look under date of January 23, 1920, and after you have read it yourself, I will ask you whether the statement made there is true, and then I will ask you what the statement is.

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial; it is strictly incompetent testimony.

The COURT.—You are not pursuing the proper course. You ask him a question: "When did you commence irrigating, in what year, or in what

(Testimony of F. G. Bromley.)

month?" If he cannot remember, he can look at his diary, and answer you from his memory.

Mr. BARENDT.—Q. When did you commence irrigating in [197] the year 1920, if you can remember without consulting your diary?

The COURT.—You are not supposed to know that he has got a diary. If the witness says: "I will have to refer to my diary," then he is at liberty to do so.

Mr. BARENDT.—Q. When did you commence irrigating in 1920?

A. I commenced ditching for irrigation on January 23d.

Mr. SCHLESINGER.—I object on the ground that this witness is reading from his diary.

The COURT.—He has a right to; he is refreshing his memory; he is not reading from the diary.

The WITNESS.—I will give you the date in a minute.

Mr. BARENDT.—Q. Give us the date?

A. I commenced ditching on the 23d with the new ditcher that had to be bought; it was double the size that Mr. Warren had used.

Mr. SCHLESINGER.—I understand that is the date he commenced?

Mr. BARENDT.—Yes.

The WITNESS.—(Contg.) We were watching water in the creek very carefully, day by day, anticipating sufficient water. I tried my pump several times, and could pump air. The first day of irrigation to any extent was the 16th of March.

(Testimony of F. G. Bromley.)

Mr. SCHLESINGER.—Q. There was nothing between the 23d of January and the 16th of March?

A. There was not sufficient water available; then there was a lull in the water; the water went down; there was only sufficient water to pump a short time; owing to the lack of rain we had to stop; then there was plenty of rain on March 21st. The tractor was working. I was irrigating again on the 23d of March.

Mr. BARENDT.—Q. Give the hours.

A. 8:30 to 6; 8:30 A. M. until 6. [198]

The COURT.—Q. Did you ever commence irrigating as late as 10 o'clock?

A. I have no knowledge of doing so, unless it was for some specific reason. Then on the following day, irrigating from eight to one.

Mr. SCHLESINGER.—That is the 24th of March?

Mr. BARENDT.—Yes.

The WITNESS.—(Contg.) On that same day, Mr. Warren must have had the afternoon work because my pump was working from 8 A. M. until 5:30; I have got my meter readings. The following day the pump was in trouble, and we were irrigating from 11 to 5. The valves used to get out of order very frequently. It was not a new, modern pump. On the 26th of March, pump trouble, in the early morning. It was always a great difficulty to start that pump to work. Okumura used to be out there, sometimes six or seven o'clock in the morn-

(Testimony of F. G. Bromley.)

ing; it would take him an hour or an hour and a half to start the pump on account of faulty valves. On one or two occasions I would go to Mr. Warren who was familiar with working of the pump and ask him if he could help me; he would come over; on some occasions he was lucky, and on others he was not. On the 27th of March we were irrigating all day. The following day was Sunday; we were not irrigating.

The COURT.—Just run through your diary and see generally how much irrigating you did, and how long that was kept up that season.

The WITNESS.—(Contg.) On the 29th, all day. On the 30th, all day. On the 31st part of the day; the pump failed.

Mr. SCHLESINGER.—Do I understand, your Honor, that the witness is permitted to run over his diary?

The COURT.—Yes; so he will be able to testify by refreshing [199] his memory how much irrigation he did, and what time of the season.

The WITNESS.—(Contg.) On the 17th of April, irrigating all day. The 18th was Sunday. 19, 20, and 21st.

Mr. SCHLESINGER.—Q. Does your diary show the time you commenced on those days?

A. Yes; nine to six; that is when the water was actually running on the ground. Prior to that Okumura was trying to get the pump to start; he would begin at six to start the pump, and complete it at seven.

(Testimony of F. G. Bromley.)

The COURT.—Q. How long did you keep your irrigation up that year?

A. Up to the 21st of April.

Mr. BARENDT.—Q. Look at your diary under dates of June 2d, June 10th, and June 28th?

A. On June 2d, all day. This could not have been from the creek; this must have been domestic water; the water for grapes which I pumped from Mr. Pash's side of the road. There is another mention—

Mr. BARENDT.—Q. (Intg.) How about the 28th? A. The same place.

Q. Did you have any conversation with Mr. Posthlewaite about the lateness of the water?

Mr. SCHLESINGER.—Objected to as incompetent, irrelevant and immaterial, and self-serving.

A. Repeatedly, day by day.

Mr. BARENDT.—Q. You heard Mr. Warren state yesterday that he had no motor to operate the pump on his land: Did you ever see a motor there?

A. Yes.

Q. Did you ever see it operating there?

A. Yes.

Q. You heard Mr. Warren state he had one-half a day and one-half a night in 1920 of the use of the water from Stephens Creek: [200] What is your recollection or knowledge about that?

A. To my knowledge I pumped for him a few afternoons—

The COURT.—You were not asked that. How much did he use your pump?

(Testimony of F. G. Bromley.)

Mr. BARENDT.—Q. Did he *to knowledge* use it more than one night? A. Yes.

Q. How many times; have you any idea?

A. I am positive of two nights, and a day and a half.

The COURT.—That is enough.

Mr. BARENDT.—Q. Something was said with reference to the condition of that cow: Can you explain the condition of that cow? Are you familiar with cattle? A. Somewhat.

The COURT.—We will draw the line on that.

Mr. BARENDT.—Q. Do you remember the first time you ever entered that house which you occupied during the year 1920? A. Yes.

Q. Was the door opened or locked?

A. Mr. Cruthers showed me all over the house. The door was not locked.

Q. It was not? A. No.

Q. Did anybody admit you? A. No.

Q. You walked in? A. Yes.

Q. Did you, as a matter of fact, frequently leave your door open there? A. Yes, always.

Mr. BARENDT.—Mr. Bromley feels that his financial standing has been impugned by the fact that he stated he was a man of wealth—and there have been certain references about it. I am prepared to show that when he made those statements he had large means.

Q. Mr. Bromley, did you in the year 1920 have interests [201] anywhere outside of Santa Clara Valley, through which you suffered financial losses?

(Testimony of F. G. Bromley.)

A. Yes.

Q. Are you at the present time receiving, or have you since then received any returns from any of those investments? A. No.

Q. Where were those investments?

A. In Russia, in China; in the South Pacific; in England.

Q. Have you at this moment any money on deposit in any bank anywhere? A. Yes.

Q. Where? A. In Russia.

Q. How much?

A. Several thousand pounds sterling; what it would be now we can't tell.

Q. What is the bank?

A. The Russia and English Bank.

Q. Are you connected with any trading company in the Orient? A. With several.

Q. Did you have any shipping? A. Yes.

Q. What have you got? A. A vessel.

Q. Do you own any vessel?

A. I own one, and am part owner in four others.

Q. Has it paid you any returns at all since 1920?

A. No.

Q. If you did make such representations, were they true, or not?

A. They were absolutely true. (Tr., pp. 181–190.)

On cross-examination the witness testified as follows:

Mr. SCHLESINGER.—Q. You say you are the owner of several vessels?

(Testimony of F. G. Bromley.)

A. I am owner of one; and part owner of the four others. [202]

Q. What are the names of those vessels, and where are they?

A. They are in the Pacific, trading down the China Coast and in the Straits Settlement. The boat I referred to as owning is the "Kango."

Q. Where does she ply?

A. Between Hongkong and Torres Island.

Q. Is she there now?

A. She was the last time I heard from her.

Q. When did you last hear from her?

A. The early part of last year.

Q. Who is captain of her?

A. I cannot tell you that. She is under control of my agents in Hongkong.

Q. What is the name of your agent?

A. Hang Mow & Company.

Q. When did you last have any correspondence with that concern?

A. The correspondence goes to London, my headquarters are in London.

Q. Have you any letters from them now?

A. It is quite possible I have, but not recent letters.

Q. What are the names of the other vessels?

A. The "Asia."

Q. Where is she?

A. I cannot tell you. I saw her in Hongkong Harbor.

Q. What is the tonnage of the "Asia"?

(Testimony of F. G. Bromley.)

A. About 22,000.

Q. Where is she registered?

A. She is registered under the Chinese flag. You will find the "Asia" registered in Lloyds. She was a British cruiser.

Q. What is the name of her master?

A. I cannot [203] tell you the name of the master.

Q. When did you last hear from that vessel?

A. In the spring of last year; she came up from the Islands loaded with copra; that is the last thing I heard of her.

Q. These vessels are in your name? A. No.

Q. Are you registered as part owner in any of these vessels? A. Yes.

Q. In all four of them?

A. In all four,—in the company.

Q. Registered where?

A. In the headquarters at Hongkong, in the British Government.

Q. You have no correspondence of recent date concerning them? A. No; it is not necessary.

The COURT.—Q. How does it come that you received no returns from these investments?

A. They are not making money at the present time, like many other commercial organizations in the Orient.

Q. When did you last receive returns?

A. When I was in Hongkong, just before coming to California.

Q. Did you come from Hongkong here?

(Testimony of F. G. Bromley.)

A. Yes.

Mr. SCHLESINGER.—Q. What is the aggregate tonnage of those vessels, do you know?

A. I cannot tell you.

Q. How long have you been connected with them as part owner?

A. Between eighteen and nineteen years.

Q. When did you last receive any letter from your agent or anyone else concerning them?

A. In the early part of last year, communications from Hongkong, and in December of the previous year from London.

Q. Have you them?

A. They are amongst my papers somewhere. [204]

Q. You don't know where?

A. No,—in my case at home.

Q. You just told counsel that you had on deposit in some bank several thousand pounds sterling?

A. Yes.

Q. In what bank is that on deposit?

A. The Russia and English Bank, in Petrograd; that was sterling exchange from London to Russia before the war.

Q. In your name? A. In my name, yes.

Q. Have you the bank-book?

A. Yes, I believe I have the bank-book; if I have not, it is in London.

The COURT.—Q. When did you have any communication concerning your account?

A. When I was last in Russia. You will see on

(Testimony of F. G. Bromley.)

the passport which I have with me it was about four months before the declaration of the war.

Q. Have you that communication?

A. It was in person.

Mr. SCHLESINGER.—Q. Have you had any communication from the bank or anybody in Russia concerning those several thousand pounds sterling?

A. Not since I was in Petrograd last, the first year of the war.

Q. Did you have any communication, or documentary evidence of any kind? A. No.

Q. Does this passport show anything about a deposit in any bank? A. No.

Q. You were engaged in the opium trade, were you not? A. I have been. (Tr., pp. 190–193.)

Testimony of Harry Postlethwaite, for Plaintiff (Recalled—In Rebuttal).

HARRY POSTLETHWAITE, recalled for the plaintiff in rebuttal, [205] testified as follows:

Mr. BARENDT.—Q. You heard the statement made by Mr. Warren that in January and February, some time in 1921, he had to plant some 500 trees. You testified here you were on that ranch on January 7, 1920, and on many occasions up to the time of the gathering of the last grapes, did you not? A. Yes.

Q. From your knowledge of that ranch, at that time, do you consider that if the 500 trees should have been planted in 1921, that you—in other words, from what you saw on that ranch was it just as

(Testimony of Harry Postlethwaite.)

imperative that those trees should have been planted in 1920?

A. I consider eighty per cent of the whole place should have been replanted.

Q. When you *say* it? A. Yes.

Q. When is it customary to order—

Mr. SCHLESINGER.—The card shows when he ordered.

Mr. BARENDT.—Q. You spoke yesterday of Judge Lieb's ranch? A. No, his son's.

Q. You referred to Judge Lieb's son's place?

A. On his son's place,—it is all Judge Lieb's.

Q. You spoke about being at Judge Lieb's son's place? A. Yes.

Q. In your experience as an orchardist, do you consider it wise to plant young trees in between old ones? A. No.

Q. Why?

A. Because I don't believe you can make a success of it.

Q. Have you had experience? A. Yes.

The COURT.—Q. Do the old trees shadow them?

A. The roots are right in the middle, and young trees put there, the old trees have the stronger roots and they sap the nourishment. (Tr., pp. 193, 194.) [206]

On cross-examination said witness testified as follows:

Mr. SCHLESINGER.—Q. Don't you know it is quite customary in that Valley to plant in young trees, interset amongst old ones, and ultimately root

out the old trees, when the young ones have attained sufficient maturity? A. I know it is done.

The COURT.—He is testifying as to the impropriety of the method, in his judgment.

Mr. BARENDT.—That is the plaintiff's case.

Mr. SCHLESINGER.—That is the case for the defendants.

(Testimony closed.)

The COURT.—The matter will be submitted on briefs, ten, ten and ten. (Tr., p. 194.) [207]

Thereafter briefs were submitted to the Court by the respective parties and after due consideration thereof the Court made and entered judgment in favor of the plaintiff, as follows, to wit:

"The COURT (Orally).—In the case of Bromley vs. Warren heretofore tried and submitted, the parties entered into a contract for the sale and purchase of orchard property in Santa Clara Valley. The terms and interpretation of the provisions of the contract were fully discussed and the views of the Court given at the argument and I need not repeat them. The action is brought by the plaintiff, the purchaser, to recover a payment made by him under the contract and the value of certain property upon the place, growing out of the fact that the defendant entered upon the place within the first year, or almost immediately after the termination of the first year, and seized the property with the plaintiff's personalty that was found thereon, on the theory that the plaintiff had breached the contract and the action proceeds upon

the theory that the entry of the defendant was a breach of the contract on his part. I am not going to review the evidence but after its careful consideration it is sufficient for me to say that in my view plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements; and that he was entirely within his rights in treating the conduct of the defendant as a breach of the contract by the latter and suing to recover the moneys that had been paid by him upon the contract with the value of the personal property taken by the defendant and also the expenditures by him made in undertaking to carry out the contract. The payment made by the plaintiff was $6,000 and that he is entitled to recover. I find that the value of the personal property belonging to the plaintiff [208] that was upon the premises when taken over by the defendant to be $1,800 and I find the amount of money expended by the plaintiff over and above what he received in the way of returns from crops, etc., to be $1,200 and judgment will be entered in favor of the plaintiff in the total of these sums."

Thereafter and on the 14th day of September, 1922, defendants served and filed herein their petition for a new trial which petition was and is in the words and figures as follows, to wit:

"In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Petition for a New Trial.

Your petitioners, Charles E. Warren and Mabel D. Warren, the defendants in the above-entitled cause, file this their petition for a new trial herein and move the Court to grant a new trial in the above-entitled cause and to vacate and set aside the final judgment heretofore made and entered herein in favor of the said plaintiff and against the said defendants and to grant said defendants a new trial of this action upon the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment herein.

(2) That said decision and judgment is against law. [209]

(3) Errors in law occurring at the trial and excepted to by the defendants.

That the papers on which this petition for a new trial is to be made are the pleadings and

papers on file in the above-entitled action and upon the minutes of the court, and the Reporter's Transcript of his shorthand notes taken on the trial of said action.

The following is a specification of the particulars wherein the evidence is claimed to be insufficient to justify the decision and judgment rendered herein, viz.:

I.

That the evidence indisputably shows that the plaintiff had failed to perform the terms of his contract at the time of the defendants' re-entry, and had not performed at any time, or offered to perform.

(a) That he had failed to farm the orchard in a first-class orchardist-like manner as required by the contract to purchase the orchard in this:

He failed to irrigate the orchard at the proper season of the year, thereby causing a large number of fruit trees to die and to receive insufficient moisture. That he failed to remove dead trees from the orchard and to replant new trees as the contract required him to do.

(b) That he failed to irrigate large portions of the orchard as the contract required.

(c) That he failed to prune the trees in the orchard at the proper season, or at all, causing an almost total failure of crops.

(d) That he failed to exterminate rodents and other pests as far as reasonably possible and in consequence thereof [210] seventy-three of the fruit trees in said orchard died.

(e) That he failed to plow and cultivate the orchard in a first-class manner as required by the contract.

(f) That he failed to pay the taxes against the property as he was required to do under the contract.

(g) That the defendants, in consequence of plaintiff's failure to pay said taxes were compelled to pay the same and the plaintiff never offered to repay the defendants therefor.

(h) That the plaintiff failed to pay the interest on the unpaid purchase price of the orchard as required by the contract; that there was due from the plaintiff to the defendants as interest on December 1, 1920, the sum of Two thousand seven hundred Dollars ($2,700.00).

(i) That the plaintiff never offered to pay said interest.

(j) The evidence conclusively shows that the plaintiff had abandoned the premises before the re-entry of the defendants.

(k) That the evidence indisputably shows that the employees of the plaintiff on said orchard left their employment because plaintiff failed to pay them.

(l) That plaintiff had openly announced that he had given up the orchard.

(m) That he would invest no money of his own in the orchard.

(n) That at the time of the re-entry of defendants the orchard was vacant and such entry was

absolutely necessary for the preservation of said orchard.

(o) That at no time did plaintiff offer to return to said premises or to perform his contract with the defendants.

(p) That the evidence indisputably shows that plaintiff frequently announced that he was impecunious and unable to [211] run the orchard.

(p) That the evidence shows that plaintiff told the defendants and other persons that he expected to leave the orchard and to engage in some other occupation, and that he would not take the place back.

(r) The evidence indisputably shows that plaintiff failed and refused to perform his contract, and he failed to fulfill the stipulations on his part to be kept and performed, and therefore he was not entitled to recover back the moneys he had paid to the defendants on account of the purchase price of the orchard or for improvements made by him on said orchard, or to recover from the said defendants any money whatever.

(s) That the evidence indisputably shows that the said defendants did not breach their contract with plaintiff, and that said defendants had not caused a great loss and/or damage or any loss or damage to plaintiff in a sum exceeding Twelve Thousand and Twenty-five Dollars ($12,025.00) or in any sum of money whatever or at all.

(t) That there is no evidence to show that the plaintiff had laid out or expended the sum of Three Thousand Five Hundred and Twenty-five Dollars

($3,525.00) or any other sum of money in the cultivation of said orchard and including the alleged value of his own labor thereon.

(u) The evidence indisputably shows that said orchard was not enhanced in value in any sum of money whatever resulting from any labor or care bestowed thereon by the plaintiff or any one working for plaintiff.

(v) That the evidence indisputably shows that plaintiff expended no money whatever in the cultivation of the orchard.

(w) The evidence absolutely fails to show that on or [212] about December 1st, 1920, or at any time whatever, or at all, the defendants wrongfully or unlawfully took and have since held possession of or converted to their own use or have deprived plaintiff of the right of possession of any personal property whatever or of anything of value.

The following is a specification of the particular errors of law relied upon:

First. The Court erred in deciding that the defendants had no right to retain the money paid by plaintiff on account of the purchase price of said orchard, cost of improvement or other moneys paid by plaintiff to the defendants as compensation for the rental and occupation of the said orchard as provided by Section 16 of the contract entered into between the plaintiff and the defendants, which reads as follows:

> "That in the event said party of the second part fails to perform *any* of the terms and conditions of this agreement, or shall make default

> in any payment of principal or interest, then all of the rights of the party of the second part hereto shall terminate *and all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and occupancy of the said land up to the time of such default";*

as the evidence conclusively shows that plaintiff had failed to perform any of the material conditions of the contract on his part to be kept and performed, namely: that he failed to plow, cultivate, and care for the orchard in a first-class farmer-like way; the he failed to irrigate the orchard at the proper season of the year thus causing a large number of fruit trees therein to die and to receive insufficient moisture; he failed to remove dead trees from the orchard and to replace them with new trees; that he failed to irrigate large portions of the orchard; that he failed to prune the fruit trees in the orchard in the proper [213] season for pruning or at all, thereby causing an almost total failure of fruit crop; that he failed to exterminate rodents and other pests as far as reasonably possible in consequence of which seventy-three fruit trees in said orchard died; he failed to pay the taxes against the property and the defendants were obligated to do so in order to prevent said property from being sold for taxes; that he failed to repay or offer to repay to the defendants the taxes paid by them as aforesaid; that he failed to pay the interest on the unpaid purchase price of the land; that there was due from plaintiff to the defendants

for interest on December 1, 1920, the sum of two thousand seven hundred dollars ($2,700.00); that he has never offered to pay said interest; that he abandoned the premises before the re-entry of the defendants; that the employees of plaintiff on said orchard left their employment because plaintiff failed to pay them; that plaintiff openly announced that he had given up the orchard; that he would advance no money of his own therein; that at no time had plaintiff offered to return to said premises and/or perform his contract. That plaintiff frequently announced that he was impecunious and unable to run and operate the orchard; that he told the defendants and other persons that he expected to leave the premises and engage in some other occupation and that he would not take the orchard back.

Second. That the Court erred in deciding that the following written notice, namely:

> "Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform any of the terms and conditions of your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of Lots 5 & 6, and part of the northeast quarter of the southeast quarter of Sec. 10 Township 7, South Range 2 West, M. D. B. & M., Santa Clara County, California, and personally thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price

[214] will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement,"

given by the defendants to plaintiff constituted a rescission of the contract for the reason that when said notice was given plaintiff was in default in the particulars hereinbefore specified; that he had abandoned the premises and the notice specifically states that all moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land as provided by Section 16 of the agreement,

"All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement."

Third. That the Court erred in finding that the defendants put an end to the contract and in not finding that the defendants stood squarely on the contract made with the plaintiff.

Fourth. That the Court erred in not finding that the defendants were entitled to retain all moneys paid to them by plaintiff pursuant to provisions of Section 16 of the contract or agreement made between plaintiff and defendants as aforesaid.

Fifth. The Court erred in finding the defendants entered and took possession of the premises without right.

Sixth. The Court erred in finding that there was a failure of consideration on the part of the defendants and that therefore plaintiff was entitled to a judgment against them.

Seventh. That the Court erred in making and entering judgment herein in favor of the plaintiff and against the defendants.

WHEREFORE said defendants pray that this their petition to vacate and set aside the decision and judgment made and entered [215] herein and to grant defendants a new trial of this action be granted.

Dated September 14th, 1922.

CHARLES E. WARREN,
MABEL D. WARREN,
Defendants and Petitioners.

EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Defendants and Petitioners."

The foregoing bill of exceptions contains all the evidence that was adduced and all the proceedings had on the trial of said cause and on the motion for a new trial of said cause.

Presentation of Bill of Exceptions, Notice Thereof, and Stipulation for Settlement and Allowance Thereof.

The defendants herewith present the foregoing as defendants' bill of exceptions herein, and respectfully ask that the same may be allowed.

BERT SCHLESINGER,
EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

To Arthur H. Barendt, Esq., Attorney for Plaintiff.

Sir: You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendants Charles E. Warren and Mabel D. Warren in the above-entitled cause, and that said defendants will ask the allowance of the [216] same.

BERT SCHLESINGER,
EDWIN A. WILCOX,
FRY & JENKINS,
Attorneys for Defendants.

It is hereby stipulated that the foregoing bill of exceptions is correct, and that the same be settled and allowed by the Court.

ARTHUR H. BARENDT,
Attorney for Plaintiff.
BERT SCHLESINGER,
EDWIN A. WILEY,
FRY & JENKINS,
Attorneys for Defendants.

Order Making Bill of Exceptions Part of the Records.

This bill of exceptions having been duly presented to the Court, and having been amended to correspond to the facts, is now signed and made a part of the records in this cause.

Dated this 18th day of November, 1922.

WM. C. VAN FLEET,
Judge.

Due service and receipt of a copy of the within is hereby admitted this 23d day of October, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 20, 1922. Walter B. Maling, Clerk. [217]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Petition for Writ of Error.

Now comes Charles E. Warren and Mabel E. Warren and bring this their petition for writ of error to the Southern Division of the District Court of the United States, for the Northern District of California, and in that behalf petitioners show:

On the 11th day of September, 1922, there was made, rendered and entered in the above-entitled court and cause a judgment in favor of said plaintiff and against said defendants Charles E. Warren and Mabel D. Warren, for the sum of Nine Thousand Dollars ($9,000.00), and costs amounting to the sum of Fifty-five and 40/100 Dollars ($55.40).

And your petitioners show that they are advised by counsel and they aver that there was and is manifest error in the records and proceedings had in said cause, and in the making, rendition and entry of said judgment, to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the said record and by [218] an examination of the bill of exceptions to be tendered and filed and in the assignments of errors presented herewith; and to that end thereafter that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners now pray that a writ of error may be issued, directed therefrom to said Southern Division of the District Court of the United States for the Northern District of California, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause, that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened, may be duly corrected, and full and speedy justice done to your petitioners.

Dated November 20th, 1922.

E. A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Petitioners.

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1922. Walter B. Maling, Clerk. [219]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Assignment of Errors.

Charles E. Warren and Mabel D. Warren, the defendants in the above-entitled action, having petitioned for an order from said Court permitting them to procure a writ of error to this court directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in said cause in favor of said plaintiff and against Charles E. Warren and Mabel D. Warren, the above-named defendants, now make and file with said petition the following assignment of errors herein upon which they will rely for a

reversal of said judgment upon the said writ, and which errors and each and every of them are to the great detriment, injury and prejudice of the said defendants; and they say that in the record and proceedings in the above-entitled action, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error in this, to wit:

1. That the evidence indisputably shows that the plaintiff had failed to perform the terms of his contract at the time of [220] the defendants' re-entry, and had not performed at any time, or offered to perform.

(a) That he had failed to farm the orchard in a first-class orchardist-like manner as required by the contract to purchase the orchard in this:

He failed to irrigate the orchard at the proper season of the year, thereby causing a large number of fruit trees to die and to receive insufficient moisture. That he failed to remove dead trees from the orchard and to replant new trees as the contract required him to do.

(b) That he failed to irrigate large portions of the orchard as the contract required.

(c) That he failed to prune the trees in the orchard at the proper season, or at all, causing an almost total failure of crops.

(d) That he failed to exterminate rodents and other pests as far as reasonably possible and in consequence thereof seventy-three of the fruit trees in said orchard died.

(e) That he failed to plow and cultivate the orchard in a first-class manner as required by the contract.

(f) That he failed to pay the taxes against the property as he was required to do under the contract.

(g) That the defendants, in consequence of plaintiff's failure to pay said taxes, were compelled to pay the same and the plaintiff never offered to repay the defendants therefor.

(h) That the plaintiff failed to pay the interest on the unpaid purchase price of the orchard as required by the contract; that there was due from the plaintiff to the defendants as interest on December 1, 1920, the sum of Two Thousand Seven Hundred Dollars ($2,700.00). [221]

(i) That the plaintiff never offered to pay said interest.

(j) The evidence conclusively shows that the plaintiff had abandoned the premises before the re-entry of the defendants.

(k) That the evidence indisputably shows that the employees of the plaintiff on said orchard left their employment because plaintiff failed to pay them.

(l) That plaintiff had openly announced that he had given up the orchard.

(m) That he would invest no money of his own in the orchard.

(n) That at the time of the re-entry of defendants the orchard was vacant and such entry was

absolutely necessary for the preservation of said orchard.

(o) That at no time did plaintiff offer to return to said premises or to perform his contract with the defendants.

(p) That the evidence indisputably shows that plaintiff frequently announced that he was impecunious and unable to run the orchard.

(q) That evidence shows that plaintiff told the defendants and other persons that he expected to leave the orchard and to engage in some other occupation, and that he would not take the place back.

(r) The evidence indisputably shows that plaintiff failed and refused to perform his contract, and he failed to fulfill the stipulations on his part to be kept and performed, and therefore he was not entitled to recover back the moneys he had paid to the defendants on account of the purchase price of the orchard or for improvements made by him on said orchard, or to [222] recover from the said defendants any money whatever.

(s) That the evidence indisputably shows that the said defendants did not breach their contract with plaintiff, and that said defendants had not caused a great loss and/or damage or any loss or damage to plaintiff in a sum exceeding Twelve Thousand and Twenty-five Dollars ($12,025.00) or in any sum of money whatever or at all.

(t) That there is no evidence to show that the plaintiff had laid out or expended the sum of Three

Thousand Five Hundred and Twenty-five Dollars ($3,525.00) or any other sum of money in the cultivation of said orchard and including the alleged value of his own labor thereon.

(u) The evidence indisputably shows that said orchard was not enhanced in value in any sum of money whatever resulting from any labor or care bestowed thereon by plaintiff or anyone working for plaintiff.

(v) That the evidence indisputably shows that plaintiff expended no money whatever in the cultivation of the orchard.

(w) The evidence absolutely fails to show that on or about December 1st, 1920, or at any time whatever, or at all, the defendants wrongfully or unlawfully took and have since held possession of or converted to their own use or have deprived plaintiff of the right of possession of any personal property whatever or of anything of value.

2. That the Court erred in not holding that the decision of the Superior Court of the State of California for the County of Santa Clara sustaining the demurrer to the complaint for the same cause of action and between the same parties constituted a bar to the action herein.

3. The Court erred in deciding that the defendants [223] had no right to retain the money paid by plaintiff on account of the purchase price of said orchard, cost of improvement or other moneys paid by plaintiff to the defendants as compensation for the rental and occupation of the said orchard as provided by Section 16 of the contract entered into

between the plaintiff and the defendants, which reads as follows:

> "That in the event said party of the second part fails to perform *any* of the terms and conditions of this agreement, or shall make default in any payment of principal or interest, then all the rights of the party of the second part hereto shall terminate and *all payments theretofore made shall be retained by the said parties of the first part and treated as compensation for the rental and* occupancy of the said land up to the time of such default";

as the evidence conclusively shows that plaintiff had failed to perform many of the material conditions of the contract on his part to be kept and performed, namely: that he failed to plow, cultivate, and care for the orchard in a first-class, farmer-like way; that he failed to irrigate the orchard at the proper season of the year thus causing a large number of fruit trees therein to die and to receive insufficient moisture; he failed to remove dead trees from the orchard and to replace them with new trees; that he failed to irrigate large portions of the orchard; that he failed to prune the fruit trees in the orchard in the proper season for pruning or at all, thereby causing an almost total failure of fruit crop; that he failed to exterminate rodents and other pests as far as reasonably possible in consequence of which seventy-three fruit trees in said orchard died; he failed to pay the taxes against the property and the defendants were obligated to do so in order to prevent said property from

being sold for taxes; that he failed to repay or offer to repay to the defendants the taxes paid by them as aforesaid; that he failed to pay the interest on the unpaid purchase price of the land; that there was due from plaintiff to the defendants for interest on December [224] 1, 1920, the sum of two thousand seven hundred dollars ($2,700.00); that he has never offered to pay said interest; that he abandoned the premises before the re-entry of the defendants; that the employees of plaintiff on said orchard left their employment because plaintiff failed to pay them; that plaintiff openly announced that he had given up the orchard; that he would advance no money of his own therein; that at no time had plaintiff offered to return to said premises and/or perform his contract. That plaintiff frequently announced that he was impecunious and unable to run and operate the orchard; that he told the defendants and other persons that he expected to leave the premises and engage in some other occupation and that he would not take the orchard back.

4. That the Court erred in deciding that the following written notice, namely:

> "Mr. and Mrs. Chas. E. Warren have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed in their agreement to sell and your agreement to buy their 51.61 acres of land, part of Lots 5 & 6, and part of the northeast quarter of the southeast quarter of Sec. 10 Township 7, South

> Range 2 West, M. D. B. & M., Santa Clara County, California, and personally thereon, they have elected to terminate the agreement, and have taken possession of the property. All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement,"

given by the defendants to plaintiff constituted a rescission of the contract for the reason that when said notice was given plaintiff was in default in the particulars hereinbefore specified; that he had abandoned the premises and the notice specifically states that all moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land as provided by Section 16 of the Agreement,

> "All moneys heretofore paid on the purchase price will be treated as compensation for the rental and occupancy of the land, as provided by Section 16 of the agreement." [225]

5. That the Court erred in finding that the defendants put an end to the contract and in not finding that the defendants stood squarely on the contract made with the plaintiff.

6. That the Court erred in not finding that the defendants were entitled to retain all moneys paid to them by plaintiff pursuant to provisions of Section 16 of the contract or agreement made between plaintiff and defendants as aforesaid.

7. The Court erred in finding the defendants

entered and took possession of the premises without right.

8. The Court erred in finding that there was a failure of consideration on the part of the defendants and that therefore plaintiff was entitled to a judgment against them.

9. That the Court erred in making and entering judgment herein in favor of the plaintiff and against the defendants.

Dated November 20, 1922.

E. A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,

Attorneys for Defendants and Plaintiffs in Error.

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1922. Walter B. Maling, Clerk. [226]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Order Allowing Writ of Error.

The petition of Charles E. Warren and Mabel D. Warren, defendants above named, for a writ of error herein, having been duly considered, is hereby allowed; and, the bond for costs upon the writ of error is hereby fixed at the sum of Five Hundred Dollars ($500.00).

Dated: November 20th, 1922.

WM. C. VAN FLEET,
District Judge of the United States for the Northern District of California.

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1922. Walter B. Maling, Clerk. [227]

In the Southern Division of the District Court of the United States in and for the District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS that we, Charles E. Warren and Mabel D. Warren, defendants above named, as principals, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto F. Genn Bromley, the plaintiff in the above-entitled action, in the full and just sum of Ten Thousand Five Hundred Dollars ($10,500), to be paid to the said F. Genn Bromley, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of November, 1922.

WHEREAS on the 11th day of September, 1922, the District Court of the United States for the Southern Division of the Northern District of California, Second Division, in a suit pending in said court between the said F. Genn Bromley, as plaintiff, and Charles E. Warren and Mabel D. Warren, as defendants, made and [228] entered a judgment in favor of the said plaintiff and against the said defendants in the sum of Nine Thousand Dollars ($9,000) and costs expended, taxed at Fifty-five and 40/100 Dollars ($55.40); and,

WHEREAS, the said defendants are about to apply for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment, and for a citation directed

to the plaintiff to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at the time fixed in said citation; and,

WHEREAS, the said defendants are desirous of staying the execution of said judgment, and we do further in consideration thereof and of the premises jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the said sum of Ten Thousand Five Hundred Dollars ($10,500), that if the said judgment appealed from, or any part thereof be affirmed, or the writ of error be dismissed, the said defendants will pay in United States gold coin the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the said defendants, or either of them, in the prosecution of said writ of error, and the surety hereto hereby agrees that in case of a breach of any condition thereof the above-named court may upon notice to it of not less than ten (10) days, proceed summarily in the action or suit in which the same was given, to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefore; that upon the performance of said conditions,

[229] then the obligation to be void; otherwise to remain in full force, virtue and effect.

CHARLES E. WARREN, (Seal)
MABEL D. WARREN, (Seal)
Principals.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, (Seal)
By PEARL MANKINS,
Its Attorney in Fact.

State of California,
County of Santa Clara,—ss.

On this sixteenth day of November, in the year A. D. one thousand nine hundred and twenty-two, before me, Grace P. Still, a notary public, in and for the county of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Pearl Mankins personally known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company of Baltimore, Md., a corporation, and the said Pearl Mankins duly acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company of Baltimore, Md., thereunto as principal and her own name as Attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal, at my office in said county of Santa Clara, the day and year in this Certificate above written.

[Seal] GRACE P. STILL,
Notary Public in and for the County of Santa Clara, State of California. [230]

State of California,
County of Santa Clara,—ss.

On this 15th day of November, in the year one thousand nine hundred and twenty-two, before me, Edwin A. Wilcox, a notary public in and for the said County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Charles E. Warren and Mabel D. Warren, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City of San Jose, county of Santa Clara, the day and year in this Certificate first above written.

[Seal] EDWIN A. WILCOX,
Notary Public in and for the County of Santa Clara, State of California.

Form and sufficiency of the within bond is approved this 20th day of Nov. 1922.

W. B. MALING,
Clerk.

[Endorsed]: Filed Nov. 20, 1922. Walter B. Maling, Clerk. [231]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Charles E. Warren and Mabel D. Warren, the defendants above named, as principals, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto F. Genn Bromley, the plaintiff in the above-entitled action, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said F. Genn Bromley, this heirs, executors administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this —— day of November, 1922.

WHEREAS, lately in the Southern Division of the District Court of the United States for the Northern District of California, Second Division,

in a suit pending in said court between the said F. Genn Bromley, as plaintiff, and Charles E. Warren and Mabel D. Warren, as defendants, a judgment was [232] rendered in favor of the said plaintiff and against the said defendants, and the said defendants, Charles E. Warren and Mabel D. Warren, having obtained from said United States District Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said F. Genn Bromley citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

Now, the condition of the above obligation is such, that if the said Charles E. Warren and Mabel D. Warren, the defendants in the aforesaid action, shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES E. WARREN, (Seal)
MABEL D. WARREN, (Seal)
Principals.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, (Seal)
By PEARL MANKINS,
Its Attorney in Fact. [233]

State of California,
County of Santa Clara,—ss.

On this 22d day of November, in the year A. D. one thousand nine hundred and twenty-two, before

me, Grace P. Still, a notary public, in and for the County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Pearl Mankins personally known to me to be the person *is* whose name she subscribed to the within instrument as the Attorney in Fact of the United States Fidelity and Guaranty Company of Baltimore, Md., a corporation, and the said Pearl Mankins duly acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company of Baltimore, Md., thereunto as principal and her own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the said County of Santa Clara, the day and year in this certificate above written.

[Seal] GRACE P. STILL,
Notary Public in and for the County of Santa Clara,
State of California.

State of California,
County of Santa Clara,—ss.

On this 22d day of November, in the year one thousand nine hundred and twenty-two, before me, Edwin A. Wilcox, a notary public in and for the said County of Santa Clara, residing therein, duly commissioned and sworn, personally appeared Chas. E. Warren and Mabel D. Warren, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in

the City of San Jose, County [234] of Santa Clara, the day and year in this certificate first above written.

[Seal] EDWIN A. WILCOX,

Notary Public in and for the County of Santa Clara, State of California.

Approved this 24th day of November, 1922.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 24, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [235]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Præcipe for Transcript on Writ of Error.

To the Clerk of the Above-named Court:

Sir: Please prepare certified transcript on writ of error of the following pleadings, papers and orders:

1st. Complaint and summons.

2d. Notice of motion to strike out parts of the complaint.
3d. Demurrer to complaint.
4th. Amended notice of motion to strike out.
5th. Amended demurrer.
6th. Order overruling demurrer and motion to strike out parts of complaint.
7th. Notice of overruling of demurrer and denying motion to strike out parts of complaint.
8th. Answer to complaint.
9th. Amendment to answer.
10th. Stipulation waiving trial by jury.
11th. Judgment.
12th. Petition for new trial. [236]
13th. Order denying new trial.
14th. Bill of exceptions as settled by trial Judge.
15th. Petition for writ of error.
16th. Order allowing writ of error.
17th. Assignment of errors.
18th. Bond for costs.
19th. Supersedeas bond.
20th. Writ of error.
21st. Citation on writ of error.
22d. Praecipe for certified transcript.

Dated: December 9, 1922.

EDWIN A. WILCOX,
BERT SCHLESINGER,
FRY & JENKINS,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 9, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [237]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred thirty-seven (237) pages, numbered from 1 to 237, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $103.80; that said amount was paid by the defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 18th day of December, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court in and for the Northern District of California. [238]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,
Plaintiff and Defendant in Error,

vs.

CHARLES E. WARREN and MABEL D. WARREN,
Defendants and Plaintiffs in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Charles E. Warren and Mabel D. Warren, plaintiffs in error, and F. Genn Bromley, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals [239] for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

_____,
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
Judge.

Dated: November 20th, 1922. [240]

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: No. 16,576. Southern Division of the District Court of the United States, Northern District of California, Second Division. F. Genn Bromley, Plaintiff in Error, vs. Charles E. Warren and Mabel D. Warren, Defendants and Plaintiffs in Error. Writ of Error. Filed Nov. 21, 1922. Walter B. Maling, Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [241]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,576.

F. GENN BROMLEY,

Plaintiff,

vs.

CHARLES E. WARREN and MABEL D. WARREN,

Defendants.

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.
To F. Genn Bromley, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office at the United States District Court for the Northern District of California, wherein Charles E. Warren and Mabel D. Warren are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [242]

WITNESS, the Honorable WM. C. VAN FLEET, Judge of the United States District Court,

for the Northern District of California, this 20th day of November, 1922.

WM. C. VAN FLEET,
United States District Judge. [243]

Receipt of a copy of the within is hereby admitted this 21st day of November, 1922.

ARTHUR H. BARENDT,
Attorney for Plaintiff.

[Endorsed]: No. 16,576. Southern Division of the District Court of the United States, Northern District of California, Second Division. F. Genn Bromley, Plaintiff, vs. Charles E. Warren and Mabel D. Warren, Defendants. Citation on Writ of Error. Filed Nov. 21, 1922. Walter B. Maling, Clerk.

[Endorsed]: No. 3956. United States Circuit Court of Appeals for the Ninth Circuit. Charles E. Warren and Mabel D. Warren, Plaintiffs in Error, vs. F. Genn Bromley, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 19, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.